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RECORD, CASE No. 14,169.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 193

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, PLAINTIFF IN ERROR,

vs.

THE WESTERN SIEMENS-LUNGREN COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 25, 1890.

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1 At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, O., in said district, on the first Tuesday of April, being also the first day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fourteenth—present, the Hon. George R. Sage, district judge—among the proceedings had were the following, to wit:

THE WESTERN SIEMENS-LUNGREN COMPANY, a Corporation Created under the Laws of the State of Illinois, Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, a Corporation Created Under the Laws of the State of Ohio, Defendant.
} #4226. For Money.

Be it remembered that heretofore, to wit, on the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, came the plaintiff, The Western Siemens-Lungren Company, by its attorneys, and filed in the clerk's office of said court their certain petition herein; said petition is clothed in the words and figures following, to wit:

Petition.

2 In the United States Circuit Court for the Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY, a Corporation Created under the Laws of the State of Illinois, Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO., a Corporation Created under the Laws of the State of Ohio, Defendant.

Petition.

The plaintiff states that it is a corporation du-y created under the laws of the State of Illinois, doing business in said State, and is a citizen and resident of the State of Illinois, and that the defendant is a corporation duly created under the laws of the State of Ohio, and is a citizen and resident of the State of Ohio in said southern district and western division, whose principal office and place of business is in the city of Cincinnati, in said State; and for cause of action against the defendant the plaintiff states—

That said defendant is indebted to the plaintiff in the sum of six thousand nine hundred and twenty-two and $\frac{64}{100}$ dollars ($6,922.64),

with interest thereon from August 8th, 1888, upon an account for goods and merchandize sold and delivered by the plaintiff to the defendant at the latter's request, an itemized statement of which account is hereto annexed, marked Exhibit "A," and made
3 part hereof; that said account is long past due and wholly unpaid, although payment thereof has frequently been demanded of the defendant, but it refused to pay the same.

Wherefore plaintiff prays judgment against said defendant for said sum of $6,922.64, with interest thereon from August 8, 1888, and for costs.

KRAMER & KRAMER,
Attorneys for Plaintiffs.

STATE OF OHIO, *Hamilton County,* } ss:

Louis Kramer, being duly sworn, says that he is the agent and one of the attorneys for the plaintiff above named, who is a non-resident of and absent from the State of Ohio, and that the facts stated in the foregoing petition are true, as he believes.

LOUIS KRAMER.

Sworn to before me and subscribed in my presence this 25th day of February, 1889.

LOWREY JACKSON,
[SEAL.] *Notary Public, Hamilton County, Ohio.*

10c. due notary.

Endorsed on petition is the following:

To the clerk:

Issue summons as within. Action to recover money. Amount claimed, $6,922.64, with interest from August 8, 1888.

We are security for costs.

KRAMER & KRAMER,
Att'ys for Pl'ff.

3½ EXHIBIT A.

Cincinnati Siemens-Lungren Gas Illuminating Company bought of the Western Siemens-Lungren Company.

1888.		
June 23.	12 ceiling plates, .27	83 24
July 11.	144 ceiling plates, .27	38 88
July 21.	52 16-ft. lamps, 20.50	1,066 00
	100 fl. plates	
	100 brass burners	
	204 16-ft. globes	
	192 12-ft. "	
	50 8-ft. "	
	Per Wells, Fargo & Co.	

1888.			
July 24.	48 16-ft. lamps, 20.50		$984 00
	By Wells, Fargo — .		
July 27.	144 ceiling plates, .27		38 88
July 30.	50 8-ft. lamps, 17.50	875	
	200 12-ft. lamps, 19.00	3,800	
			4,675 00
Aug. —.	432 ceiling plates, .27		116 64
			$6,922 64

4 And afterwards, to wit, on the same day, there was issued out of the clerk's office of said court our certain summons, directed to the marshal of the district and against the defendant herein; said summons is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, *Southern District of Ohio*, } ss:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Cincinnati Siemens-Lungren Gas Illuminating Company, a corporation created under the laws of the State of Ohio, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 4th Tuesday in the month of March, 1889, to answer unto the Western Siemens-Lungren Company, a corporation under the laws of the State of Illinois, citizen of and resident in the State of Illinois, in civil action for money only; and have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 25th day of Feb., A. D. 1889, and in the 113th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk.*
[SEAL.] By ROBT C. GEORGI, *Deputy.*

Endorsed: Moses E. Moch, security for costs. Action for the recovery of money only. Amount claimed, $6,922.64, with int. from Aug. 8, 1888, from which judgment may be taken unless it answer on or before the 4th Tuesday in the month of March, 1889.

5 And afterwards, to wit, on the 25th day of February, A. D. 1889, the following cost bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Cost Bond.

Circuit Court of the United States for the Southern District of Ohio, — Division, *ss:*

THE WESTERN SIEMENS-LUNGREN CO.
vs.
THE CINTI. SIEMENS-LUNGREN GAS ILLUMINATING CO. } Cost Bond. # —.

I hereby acknowledge myself security for costs in this case.

MOSES E. MOCH. [SEAL.]

Taken and acknowledged before me this 25th day of Feb'y, 1889.

ROBERT C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Moses E. Moch, a resident of said district, do solemnly swear that after paying my just debts and liabilities, I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.

MOSES E. MOCH.

6 Sworn to and subscribed before me this 25th day of February, A. D. 1889.

ROBERT C. GEORGI,
[SEAL.] *Deputy Clerk U. S. Circuit Court, S. D. O.*

And afterwards, to wit, on the 2nd day of March, A. D. 1889, came the marshal of the district, to whom the above summons was in form directed, and filed in the clerk's office of said court the same, with his proceedings had endorsed thereon in words and figures following, to wit:

Received this writ on the 25th day of February, A. D. 1889, and on the 26th day of February, A. D. 1889, I served the within named the Cincinnati Siemens-Lungren Gas Illuminating Company, a corporation created under the laws of the State of Ohio, by handing a true copy thereof, with the endorsements therein, to E. O. Eshelby, the president, and to Harry G. Skiff, the secretary, respectively of said corporation, each personally.

Fees.

2 copies	$1 00
1 mileage	06
2 services	4 00
	$5 06

H. C. URNER, *Marshal,*
By J. KIERSTED, *Deputy.*

7 And afterwards, to wit, on the 9th day of May, A. D. 1889, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 320.

Upon application and for good cause shown leave is given to file answer and cross-petition herein.

And afterwards, to wit, on the 9th day of May, A. D. 1889, the following answer and cross-petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer and Cross-petition.

In the United States Circuit Court for the Southern District of Ohio, W. D.

THE WESTERN SIEMENS–LUNGREN COMPANY
vs.
THE CINCINNATI SIEMENS–LUNGREN GAS ILLUMINATING CO.

Answer and cross-petition.

Defendant, for answer to plaintiff's petition, admits that it, the defendant, is a corporation duly created under the laws of the State of Ohio and is a citizen and resident of said State, in said southern district and western division, whose principal office and place of business is in the city of Cincinnati, in said State; but defendant avers that it has no knowledge as to the truth or falsity of plaintiff's allegation that it is a corporation created under the laws of the State of Illinois, doing business in said State, and is a citizen and resident thereof, and demands proof thereof.

8 & 9 Defendant, for a first defense to plaintiff's petition, state- that on the 9th day of November, 1887, the Siemens-Lungren Illuminating Company of Chicago, Ills., as party of the first part, entered into a written contract, a copy whereof is hereto attached, marked "Exhibit A," with Andrew Hichenlooper, Samuel W. Trost, J. A. S. Gray, D. L. Billingheimer, Chas. B. Wing, Moses Krohn, James Allison, Chas. Fleishman, Fred. H. Alms, and E. O. Eshelby, as parties of the second part, whereby said party of the first part, for itself, its successors and assigns, for and in consideration of the sum of one dollar and other valuable considerations, assigned, set over and conveyed to said parties of the second part the sole and exclusive right and privilege of selling, placing, and operating throughout the counties of Hamilton, Butler, and Montgomery, in the State of Ohio, of all the patented regenerative or other gas lamps, appliances, or fixtures which were then or might thereafter be made, owned, or controlled by the Siemens-Lungren Company of Philadelphia, Pa., or its assigns, the Siemens-Lungren Gas Illuminating Company, the said party of the first part. Said party of the first part further covenanted that during the entire period covered

by the licenses and patents then owned by the said Siemens-Lungren Company, or which might thereafter be acquired on improvements and reissues, the said party of the first part would sell exclusively to said parties of the second part, for use in said counties before named, all the burners, fixtures, and appliances made by the Siemens-Lungren Company, and would not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned, or controlled by said Siemens-Lungren Co., but would, upon the contrary, to the best of their ability, prevent the sale of any such articles for use within the territory named to any
10 other than the parties of the second part, their successors or assigns; that said Siemens-Lungren Gas Illuminating Company agreed to sell to said parties of the second part, their successors or assigns, the most approved form of regenerative lamp now or which might thereafter be made by said Siemens-Lungren Company of Philadelphia, at the prices named in said con*g*ract; that it would sell any new sizes or styles of lamps, fixtures, or appliances at the same proportionate rate of discount from the then or future manufacturer's list prices, which shall be uniform throughout the United States, and that in case the Philadelphia company should at any time in the future make any reduction in the price of goods furnished to or *or* through the said Siemens-Lungren Gas Illuminating Company said last named company should make a corresponding reduction to the parties of the second part. Said goods were to be delivered in good order and condition to any designated agent of the parties of the second part, at said agent's office in Cincinnati, in lots of 300 or less, within 30 days after the receipt of such order for delivery. Said party of the first part guaranteed the life service of any lamps furnis*h*ed to be five years, exclusive of any globes broken or other damage done through careless handling, and that it would defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named. Said party of the first part further agreed to defend said parties of the second part against all alleged infringements of letters patent granted to other parties, and to promptly defend the letters patent held and owned by said Siemens-Lungre*l* Company of Philadelphia, and to protect said parties of the second part from infringements by other parties, in the exclusive and unres*g*ricted use
11 of the rights, franchises, and privileges conveyed by said contract, provided said first party were duly notified and given exclusive control of any litigation which may ensue.

Defendant further states that immediately after the execution of said agreement the same was assigned by the said party of the second part to this defendant, and that it has ever since fully performed and kept all the covenants and agreements on its part to be kept and performed; that one L. J. Wolf, who claims to be the secretary, and Joseph Wolf, who is the president, of the said party of the first part, and all the parties interested in and *onlollingg* said Siemens-Lungren Gas Illuminating Co. of Chicago claims to have organized said plaintiff company and claim that said contract between the said Siemens-Lungren Illuminating Co. of Chicago, Ills.,

and said A. Hickenlooper and others had been assigned to said plaintiff company, and that it acquired by assignment and otherwise all the rights of selling the said inventions and patents in regenerative lamps in the territory named in said agreement, and said parties repeatedly attempted to have the defendants enter into a new contract with said plaintiff company, but which defendant has refused to do.

Defendant states that all the regenerative lamps and fixtures furnished, purchased by it, including those stated in the account sued upon, in and attached to plaintiff's petition, have been furnished to and purchased by it under said contract. Defendant admits
12 that it received under said contract the lamps and fixtures and in the quantities as stated in the account attached to said petition, but it avers and charges that the prices stated therein are largely in excess of the prices which it should be charged under said contract, said Philadelphia company having made a reduction in the price of such lamps and fixtures, but the exact amount of which reduction defendant has not been able to ascertain.

2nd. Defendant, for a second defense, reiterating and reaffirming all the allegations of its first defense so far as the same is a statement of the contract and its contents entered into between said Siemens-Lungren Gas Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and adopting the said allegations as a part hereof without repeating the same, states that a portion of the regenerative lamps furnished to it under said contract by said Siemens-Lungren Illuminating Co. of Chicago are in infringement of the letters patent held, owned, and controlled by the said Siemens-Lungren Co. of Philadelphia, and that the said Philadelphia company has instituted its suit against this defendant in this court in cause No. 4177 on the docket thereof, alleging that this defendant has infringed said letters patent, asking for an injunction to restrain further infringement thereof, for an account of profits, and for damages, which said suit is now pending, and of the bringing of which said suit the said Siemens-Lungren Gas Illuminating Co. of Chicago was notified immediately after the filing of the petition therein, and was given exclusive control thereof for the purpose of defending the same.

Defendants, further answering, deny all the allegations of plaintiff's petition inconsistent with the statements contained in this its answer.

13 Defendant, by way of cross-petition and for a first cause of action against plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same is a statement of the contract and its contents entered into between said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed, but that notwithstanding the

assignment and conveyance in said contract by said Siemens-Lungren Illuminating Company of Chicago of the sole and exclusive right and privilege of selling, placing, and operating throughout the counties of Hamilton, Butler, and Montgomery, in the State of Ohio, all the patented regenerative or other gas lamps, appliances, or fixtures which might then or thereafter be made, owned, or controlled by said Philadelphia Co. or its assigns, and notwithstanding the covenant of the said Siemens-Lungren Illuminating Co. of Chicago that it would, to the best of its ability, prevent the sale of any such articles for use, tha- said Siemens-Lungren Illuminating Co. did sell large quantities of the said patented lamps, appliances, and fixtures, the exact number of which, however, are not now known to defendant, in the said counties of Hamilton, Butler, and Montgomery, viz., in the towns of Dayton, Hamilton, and Middletown. Defendant alleges its damages to be by reason thereof the sum of six thousand ($6,000.00) dollars.

14 2nd. Defendant for a second cause of action against the, plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same is a statement of the contract and its contents entered into between said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof, without repeating the same, states *states* that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed, but that notwithstanding the agreement con*t*ained in said contract of the said Siemens-Lungren Illuminating Co. of Chicago that in case the said Philadelphia Co. should at any time in the future make any reduction in the price of goods furnished to defendant through the said Siemens-Lungren Gas Illuminating Company said last-named company shall make a corresponding reduction to this defendant. the said Siemens-Lungr*o*n Gas Illuminating Company continued to charge and this defendant company paid for goods so furnished prices in excess of the amounts which it should have paid under said contract, no deduction being made by reason of the reduction in price on said goods made by said Philadelphia company to said Siemens-Lungren Gas Illuminating Co. Defendant alleges that the amount so wrongfully charged it and which *which* it paid in excess of the amount which it should have been charged amounts to the sum of twenty-two hundred and fifty ($2,250) dollars.

3rd. Defendant, for a third cause of action against the plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same is a statement of the con-

15 tract and its contents entered into between the *the* said Siemens-Lungren Illuminating Co. of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed, but that notwithstanding the agreement

contained in said contract of the said Siemens-Lungren Illuminating Company of Chicago that it would defray the expenses of any incidental repairs which might be necessary to keep said lamps in good and serviceable condition during the said period of five years from the date of said contract, the said Siemens-Lungren Illuminating Co. of Chicago and its assignee, the plaintiff herein, have wholly failed to do so. Defendant alleges that it has paid out for such repairs to lamps so purchased by it, including those stated in the account attached to petition, to date, the sum of sixteen hundred dollars ($1,600), no part of which has been repaid to it.

4th. Defendant, for a fourth cause of action against the plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same are a statement of the contract and its contents entered into between the said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed; states that notwithstanding the agreement of said Siemens-Lungren Illuminating Co. of Chicago to furnish this defendant with the said patented lamps to be furnished to it by the said Philadelphia company and to defend said defendant
16 from any infringements of said patented lamps, did furnish to this defendant a large number of lamps purporting to be said patented lamps furnished by said Philadelphia company, but which were in fact in infringement thereof and of such poor quality as to be unfit for use. Upon trial of the lamps and the subsequent discovery of the infringements thereof, defendant was compelled to retire from use ninety-two lamps thereof which were in use, and they and those having remained unused became useless and worthless property. Defendant paid said Siemens-Lungren Illuminating Co. of Chicago the sum of two thousand ($2,000) dollars for said lamps, no part of which has since been paid, and that by reason of its being compelled to remove the said lamps and the consequent loss of business it has been damaged in the further sum of one thousand dollars.

5th. Defendant, for a fifth cause of action against the plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same are a statement of the contract and its contents entered into between the said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed, but that notwithstanding the agreement contained in said contract of the said Siemens-Lungren Illuminating Co. of Chicago that it would furnish the defendant with the most approved form of said regenerative lamp then or which might thereafter be made by said Philadelphia company, failed to do so, but

said Siemens-Lungren Illuminating Co. and its assignee, the plaintiff herein, sent said defendant company from time to time
17 a large number of old-style lamps, when the Philadelphia company was manufacturing and selling an improved lamp, with a "bye-pass lever;" that although the said Siemens-Lungren Illuminating Co. and its assignee, the plaintiff herein, after long delay, furnished the said improved lamp in exchange for the old, the damage to the defendant herein by reason of the cost of changing the same where in use and the cost of freightage and handling thereof amounts to the sum of one thousand ($1,000) dollars.

6th. Defendant, for a sixth cause of action against the plaintiff, reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the same are a statement of the contract and its contents entered into between the said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed; states that notwithstanding the agreement of said Siemens-Lungren Illuminating Company of Chicago to deliver in good order and condition to any designated agent of defendant, at said agent's office, in the city of Cincinnati, in lots of 300 or less, within 30 days after receipt of such order for delivery, the said Siemens-Lungren Illuminating Company of Chicago failed to deliver goods so ordered within the time stated and for a long period thereafter, causing a loss and damages to this defendant by reason of loss of trade arising from such failure to deliver within the time specified amounting to the sum of ten thousand ($10,000) dollars.

18 Wherefore defendant prays judgment against the plaintiff in the sum of twenty-three thousand eight hundred and fifty ($23,850.00) dollars.

EDWARD DIENST,
Att'y for Defendant.

STATE OF OHIO, }
Hamilton County, } *ss:*

Edwin O. Eshelby, being first duly sworn, says that he is the president of The Cincinnati Siemens-Lungren Gas Illuminating Company, the defendant in the above-entitled action, and that the allegations contained in the foregoing, its answer and cross-petition, are true, as he verily believes.

EDWIN O. ESHELBY.

Sworn to before me and subscribed in my presence this 9th day of May, A. D. 1889.

[SEAL.] W. P. WILTSEE,
Notary Public, Hamilton County, Ohio.

19. EXHIBIT A.

Whereas the Siemens-Lungren Gas Illuminating Company of Chicago, Ills. has acquired certain valuable rights, franchises and privileges from the Siemens-Lungren Company a corporation of the State of Penn., viz: The exclusive privilege of selling, placing and operating the patented and other manufactured articles and appliances of the said company throughout the State of Ohio by an agreement entered into by and between said Siemens-Lungren Co. and one Joseph Wolf, on the 22nd day of April 1887, and by said Wolf subsequently assigned to "The Siemens-Lungren Illuminating Company of Chicago, Ills. and

Whereas said last-named corporation is now desirous of conveying to other parties the rights, franchises and privileges acquired by it so far as the same applies to the counties of Hamilton, Butler and Montgomery in the State of Ohio now therefore.

This contract entered into this 9th day of November, 1887, by and between the Siemens-Lungren Illuminating Company of Chicago, Ills. party of the first part, and A. Hickenlooper, Samuel W. Trost, J. A. S. Gray, D. L. Billingheimer, Chas. B. Wing, Moses Krohn, James Allison, Chas. Fleischmann, Fred. H. Alms and E. O. Eshelby, parties of the second part, witnesseth:

First. That said Siemens-Lungren Gas Illuminating Co. for themselves their successors and assigns for and in consideration of the sum of one dollar and other valuable considerations the receipt of which is hereby acknowledged do hereby assign, set over and convey to said parties of the second part the sole and exclusive right and privilege of selling, placing and operating throughout the counties of Hamilton, Butler, and Montgomery, State of Ohio,
20 all the patented regenerative or other gas lamps, appliances, or fixtures, which are now, or may hereafter, be made, owned or controlled by the said Siemens-Lungren Company, or its assigns, the Siemens Gas Illuminating Company.

That during the entire period covered by the licenses and patents now owned by the said Siemens-Lungren Company, or which may hereafter be acquired on improvements and reissues, the said Siemens-Lungren Gas Illuminating Company will sell exclusively to said parties of the second part for use in the counties before named all the burners, fixtures and appliances, made by said Siemens-Lungren Company and will not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned or controlled by said Siemens-Lungren Co. but will upon the contrary to the best of their ability prevent the sale of any such articles for use within the territory named to any other than the parties of the second part their successors or assigns.

That said Siemens-Lungren Gas Illuminating Company will sell to said parties of the second part, their successors or assigns the most approved form of regenerative lamps now, or which may hereafter be, made by said Siemens-Lungren Company at the following prices for the first one thousand lamps ordered 8-ft. lamp $17.50; 12-ft.

lamp $19.00 and 16-ft. lamp $20.50, with two extra glass globes for each lamp, and that for all lamps ordered in excess of the first one thousand the price is to be for 8-ft. lamps $16.50 for 12-ft. lamps $18.00 and 16-ft. lamps $19.50 with freight added, and that they will sell any new sizes or styles of lamps, fixtures or appliances at the same proportionate rate of discount from present or future manufacturers' lists prices which shall be uniform throughout the United States and in case the Siemens-Lungren Co. shall at any time in the future make any reduction in the price of goods furnished
21 to or through the Siemens-Lungren Gas Illuminating Company the last-named company shall make a corresponding reduction to the parties of the second part.

The said goods to be delivered in good order and condition to any designated agent of the parties of the second part at said agent's office in the city of Cincinnati in lots of 300 or less within 30 days after receipt of such order for delivery. That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five (5) years, exclusive of any globes broken or other damage done through careless handling and that it will defray the expenses of any incidental repairs which *which* may be necessary to keep said lamps in good and serviceable condition during the period named. And that upon the expiration of said period of five years they will if the parties of the second part so desire guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid the additional sum of three (3) dollars for each lamp thus guaranteed.

That the said Siemens-Lungren Gas Illuminating Company will defend the parties of the second part against all alleged infringements of letters patent granted to other parties and will promptly defend the letter- patent held and owned by said Siemens-Lungren Company and protect the parties of the second part from infringement by other parties, in the exclusive and unrestrained use of the rights, franchises and privileges hereby conveyed providing they are duly notified and given exclusive control of any litigation which may ensue.

That the said Siemens-Lungren Gas Illuminating Co. as a part of the agreement will give to said parties of the second part a good and sufficient bond in the sum of five thousand ($5,000) dollars conditioned upon the prompt and faithful execution of all the conditions imposed by the terms of this agreement.

22 Second. That the parties of the second part, their successors and assigns will within ten days after the formal execution of this contract pay to the recognized agent of the Siemens-Lungren Gas Illuminating Company the consideration set forth in this contract and called for by the proposition heretofore made by L. J. Wolf, sec'ty under date of November 7, 1887.

That they will exercise all due and proper diligence and energy in securing the introduction of the lamps, burners and appliances of said Siemens-Lungren Co. into public use in the territory named, preference however to be first given to their introduction in the county of Hamilton, and that for all lamps ordered they will pay

according to the rates hereinbefore mentioned in cash upon the 10th day of each month for all goods delivered during the preceding month, and in the event of their failure so to do the Siemens-Lungren Gas Illuminating Company shall have the right to solicit purchases and fill orders with- the territory hereby covered.

In witness whereof, the said Siemens-Lungren Gas Illuminating Company—by its secretary L. J. Wolf, who is hereby fully authorized by power of attorney to execute the same on behalf of the president of said company—affixes his signature and the seal of said company this 9th day of November 1887, and the parties of the second part, each for himself signs the same and attaches his seal thereto.

L. J. WOLF, *Sec'y.*
JOSEPH WOLF, *Pres't.*
A. HICKENLOOPER.
E. O. ESHELBY.
D. L. BILLINGHEIMER.
SAM'L W. TROST.
M. KROHN.
CHAS. FLEISCHMANN.
J. A. S. GRAY.
JAMES ALLISON.
FRED. H. ALMS.
C. B. WING.

23 And afterwards, to wit, on the 7th day of June, A. D. 1889, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Demurrer.

In the United States Circuit Court for the Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.
} No. 4226. Demurrer.

And now comes the plaintiff and demurs to the second defense in the answer of the defendant herein for the reason that said second defense does not state facts sufficient to constitute a defense.

And plaintiff also demurs to the fifth cause of action, by way of cross-petition in said answer, for the reason that said fifth cause of action does not state facts sufficient to constitute a cause of action against plaintiff.

By KRAMER AND KRAMER,
Attorneys for Plaintiff.

And afterwards, to wit, on the 7th day of June, A. D. 1889, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

24 *Reply.*

In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY. } No. 4226.

And now comes the plaintiff and, for reply to the first defense, admits that on or about November 9th, 1887, the Siemens-Lungren Illuminating Co. of Chicago, Illinois, entered into a written contract with Andrew Hickenlooper and others, as stated in said answer, which said contract was afterwards assigned by said Siemens-Lungren Illuminating Co. to the plaintiff and was also assigned by said Andrew Hickenlooper and others to the defendants, and that a copy of said contract is attached to the said answer, marked Exhibit "A."

–. Plaintiff denies each and every other allegations in said first defense inconsistent with the petition herein and not herein specifically admitted.

2. For reply to the first cause of action, by way of cross-petition in said answer, plaintiff denies each and every allegation therein contained.

3. For reply to the second cause of action, by way of cross-petition in said answer, plaintiff denies each and every allegation in the same contained.

4. For reply to the third cause of action, by way of cross
25 *cross*-petition in said answer, plaintiff denies each and every allegation therein contained.

5. For reply to the fourth cause of action, by way of cross-petition in said answer, plaintiff denies each and every allegation in the same contained.

6. For reply to the 6th cause of action, by way of cross-petition in said answer, plaintiff denies each and every allegation in the same contained.

Wherefore plaintiff prays as in the petition.

KRAMER & KRAMER,
Attorneys for Plaintiff.

STATE OF OHIO, }
Hamilton County, } *ss:*

Louis Kramer makes oath and says that he is one of the attorneys for the plaintiff above named, The Western Siemens-Lungren Company, which is a non-resident of and absent from the State of Ohio, and that the facts contained in the foregoing reply are true, as he believes.

LOUIS KRAMER.

Sworn to before me and subscribed in my presence this 6th day of June, 1889.

LOWREY JACKSON,
Notary Public, Ham. County, Ohio.

40c. due notary.

26 And afterwards, to wit, on the 14th day of January, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 351.

Comes the plaintiff and, by leave of court first had and obtained, withdraws its demurrer heretofore filed to the second defense in the answer of the defendant contained, and also to the fifth cause of action in the cross-petition of the defendant contained, and by like leave of court files its reply to said second defense and fifth cause of action, all of which is accordingly done.

And afterwards, to wit, on the same day, there was filed in the clerk's office of said court the following reply; said reply is in the words and figures following, to wit:

Reply.

In the Circuit Court of the U. S. for the Southern Dist of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO. } No. 4226.

Reply to second defense and fifth cause of action.

Comes the plaintiff and, for reply to the second defense in the answer of defendant, denies each and every allegation therein contained.

27 And, for reply to the fifth cause of action in the cross *cross*-petition of defendant, plaintiff denies each and every allegation therein contained.

Wherefore plaintiff prays as in the petition.

KRAMER & KRAMER,
Attorneys for the Plaintiff.

STATE OF OHIO, }
Hamilton County, } *ss:*

Louis Kramer makes oath and says that he is one of the attorneys for the plaintiff above named, which is a non-resident of and absent from the State of Ohio, and that the facts contained in the foregoing reply are true, as he believes.

LOUIS KRAMER.

Sworn to before me and subscribed in my presence this — day of January, 1890.

LOWREY JACKSON,
Notary Public, Hamilton County, Ohio. [SEAL.]

40c. due notary.

And afterwards, to wit, on the 14 of Jan., A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 532.

Comes the plaintiff and, by leave of court first — & obtained, withdraws its demurrer heretofore filed to second defense in the answer of defendant contained, & also to the 5th cause of action in the X-petition of the defendant contained, & by like leave of court files its reply to said 2nd defense & 5th cause of action, all of which is accordingly done.

And afterwards, to wit, on the 7th day of February, A. D. 1890, the following amendment to petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amendment to Petition.

In the United States Circuit Court of the Southern District of Ohio, W. D.

28 THE CINCINNATI SIEMENS-LUNGREN COMPANY, Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, Defendant.

Amendment to cross-petition.

Now comes defendant in above-entitled action and, leave of court being first obtained, files this its amendment to its cross-petition by adding thereto as a 7th cause of action the following:

Defendant reiterates and reaffirms all the allegations of the first defense of its answer herein so far as the *the* same is a statement of the contract and its contents entered into between said Siemens-Lungren Illuminating Company of Chicago and said A. Hickenlooper and others and of the assignments thereof, and, adopting the said allegations as a part hereof without repeating the same, states that it, the said defendant, complied with and fulfilled all the covenants and agreements contained in said contract on its part to be kept and performed, but that notwithstanding the agreement contained in said contract of the said Siemens-Lungren Illuminating Company of Chicago that it would furnish the defendant with the most approved form of said regenerative lamp then or which might thereafter be made by said Philadelphia company, failed to do so, but furnished it with the 250 lamps sued upon in plaintiff's account, said lamps having solid metal burners instead of tube burners, the solid metal burners rendering imperfect service. Said plaintiff has refused and failed to exchange the said 250 lamps for others with the tube burners, and that by reason of such failure defendant will

be compelled to make such exchange with the parent or
29 Philadelphia company, at an additional cost of *at an additional cost* to this defendant and to its damage in the sum of seven hundred and fifty ($750.00) dollars.

Wherefore defendant prays judgment against the plaintiff as in its original cross-petition and this its amendment thereto, in the sum of $24,600.00 dollars.

EDWIN DIENST,
Att'y for Defendant.

STATE OF OHIO, }
Hamilton, } ss:

Edwin O. Eshelby, being first duly sworn, says that he is the president of the defendant in the above-entitled action, and that the allegations contained in the foregoing amendment to its cross-petition are true, as he verily believes.

EDWIN O. ESHELBY.

Sworn to before me and subscribed in my presence this 7th day of February, A. D. 1890.

[SEAL.] ROB'T C. GEORGI,
Deputy Clerk U. S. Cir. C't, S. D. O.

And afterwards, to wit, on the 6th day of Feb., A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 576.

This day came the parties, by their attorneys, and thereupon, to try the issues joined, a jury being called, came, to wit:
Albert Ankeney, E. A. Bell, D. W. Miller, Geo. R. Mitchell, Maxwell E. Morgan, Thomas A. Simpson, William Yingling, John Mullane, Clay C. Runyan, J. M. McCullough, Clarence Gilmore,
30 and John H. Watson, who were duly empaneled and sworn well and truly to try the issues joined, and, the hour of adjournment having arrived and the evidence not — concluded, the court respited the jury until Monday morning next, at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the 10th day of February, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 578.

This day again came the parties, by their attorneys, and also the jurors heretofore empaneled and sworn herein, and, having heard the evidence, the arguments of counsel, and the charge of the court, retired to their rooms to deliberate upon a verdict, attended by an officer of this court.

And afterwards, to wit, on the 10th day of Feb., A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 578.

This day again came the parties, by their attorneys, and also the jury heretofore empaneled and sworn herein, who upon their oaths do find the issues joined in favor of plaintiff, and assess its damages at fifty-seven hundred and fifty-two dollars and thirty-four cents ($5,752.34).

Question to the jury. If you make an allowance to the defendant for repairs, state in answer to this question the date and amount of each item allowed.

31	1888.		
	April 6	$24 00	
Aug.	15	4 15	
Oct.	25	96 75	
Nov.	13	12 14	
	1889.		
Jan'y	2	4 00	
Mar.	1	7 12	
	16	4 00	
April	12	73 20	
June	1	27 59	
	17	6 95	
Sept.	27	62 00	
Oct.	8	2 22	
	28	31 10	
Dec.	13	9 02	
	26	81 44	
	27	4 00	
	1890.		
Jan'y	17	20 90	
			$483 69
Labor from Aug. 18, 1888, to January 17, 1890			252 86
			$736 55

And afterwards, to wit, on the 13th day of February, A. D. 1890, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

32 Circuit Court of U. S., Southern Dist. of Ohio, W. D.

THE WESTERN SIEMENS-LUNGREN CO.
vs.
THE CIN'TI SIEMENS-LUNGREN GAS ILLU. CO.

Motion for a new trial.

Now comes the defendant and moves the court to set aside the verdict and for a new trial for the reasons following:

1. Error in the assessment of the amount of recovery, because the same is too large.

2. Because the verdict is not sustained by sufficient evidence and is contrary to law.

3rd. Error of law occurring at the trial and excepted to by the party making the application.

EDWARD DIENST,
Att'y for Def't.

And afterwards, to wit, on the 15th day of February, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Y, p. 584.

This cause coming on to be heard on defendant's motion to set aside the verdict and for a new trial, and the court being of opinion that the damages assessed by the jury are excessive to the amount of one hundred and twenty-seven $\frac{90}{100}$ dollars (127.90), the court orders that unless the plaintiff will remit from the said verdict the said sum of one hundred and twenty-seven $\frac{90}{100}$ dollars
33 a new trial be granted, but that upon said remittitur being made the said motion be overruled.

And thereupon comes the said plaintiff and in open court consents to said remittitur.

It is therefore considered and adjudged by the court that the said motion to set aside the verdict and for a new trial be, and the same hereby is, overruled, and that the plaintiff recover from the said defendant the sum of six thousand one hundred and thirty-eight $\frac{32}{100}$ dollars ($6,138.32), being the amount of said verdict and interest, less the amount of remittitur, with interest from the fourth day of Feb., 1890, and the costs herein, taxed at $——; to all of which the defendant excepts.

And afterwards, to wit, on the 25th day of Feb., A. D. 1890, the following supersedeas bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supersedeas Bond.

Circuit Court of the United States, Southern District of Ohio, Western Division, *ss:*

THE WESTERN SIEMENS-LUNGREN COMPANY
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.

Know all men by these presents that we, The Cincinnati Siemens-Lungren Gas Illuminating Co., as principal, and Edwin O.
34 Eshelby and George B. Kerper, as sureties, are held and firmly bound unto the Western Siemens-Lungren Company in the sum of twelve thousand and five hundred dollars, to be paid to the said The Western Siemens-Lungren Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 25th day of February, 1890.

Whereas the above named The Cincinnati Siemens-Lungren Gas Illuminating Co. has taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above named The Cincinnati Siemens-Lungren Gas Illuminating Co. shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.,
By E. O. ESHELBY, *Pres't.* [SEAL.]
EDWIN O. ESHELBY. [SEAL.]
GEORGE B. KERPER. [SEAL.]

Sealed and delivered in presence of—
T. H. KELLEY.
S. M. LAVIN.

The above security is approved.

GEO. R. SAGE,
District Judge of the United States, S. D. Ohio.

35 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Edwin O. Eshelby, one of the above sureties above named, do solemnly swear that after paying my just debts and liabilities I am

worth twenty thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

EDWIN O. ESHELBY.

Sworn to before me the 25th day of Feb., 1890.

ROBT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

SOUTHERN DISTRICT OF OHIO, *ss:*

I, George B. Kerper, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth twenty thousand dollars in real estate in my own name situate in the county of Hamilton, in said district.

GEORGE B. KERPER.

Sworn to before me the 25th day of February, 1890.

ROBT C. GEORGI,
Deputy Clerk U. S. Circuit Court, S. D. O. [SEAL.]

And afterwards, to wit, on the 31st day of March, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 4.

36 This day came the parties, by their counsel, and it being shown that for reasons satisfactory to the court the defendant's bill of exceptions herein cannot be completed so as be signed, sealed, and allowed at the present term, being the trial term of the court, it is hereby ordered, in accordance with the practice of this court, that the defendant be, and it is hereby, granted five days from and after this the last day of February term of this court within which time to complete the preparation of its said bill.

And afterwards, to wit, on the 1st day of April, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal Z, p. 8.

Now comes the defendant, The Cincinnati Siemens-Lungren Gas Illuminating Company, and presents to the court its bill of exceptions in this case and prays that the same may be allowed, signed, sealed, and made part of the record herein, and the court, finding that the said bill of exceptions is true and correct, does allow, sign, and seal the same and order the same to be filed and made part of the record, it being now allowed, signed, sealed, and filed at the April term, 1890, of this court, in accordance with the order of this court made at the February term of 1890 thereof—that is to say, at the trial term—and the court allows a writ of error to the Supreme Court, with a stay of execution, a supersedeas bond in the sum of $12,500.00, with good and sufficient securities, having been given and heretofore approved by the court herein.

37 And afterwards, to wit, on the 1st day of April, A. D. 1890, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Bill of Exceptions.

United States Circuit Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY, Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, Defendant. } No. 4226.

Bill of exceptions.

Be it remembered that on the trial of this action at the February term, 1890, of the United States circuit court for the southern district of Ohio, western division—Hon. George R. Sage, judge, presiding—the plaintiff, to maintain the issue on its part, offered and read in evidence the depositions of Leopold J. Wolf and Joseph Wolf, together with the exhibits thereto attached; which depositions and exhibits are hereto attached, marked Exhibit "A," and made part hereof; and thereupon plaintiff rested.

The defendant, to maintain the issue on its part, offered and read in evidence the depositions of Emanuel Stein and Henry A. Brognard, together with the exhibits thereto attached; which depositions and exhibits are hereto attached marked Exhibit "B," and
38 made part hereof.

And the defendant, further to maintain the issue on its part, called as a witness G. N. Clapp, who, being first duly sworn, testified as follows:

United States Circuit Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN CO.
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO. } No. 4226.

Testimony on Behalf of Defendant.

Witnesses.

G. N. Clapp, direct examination	Page 1
William Smith, direct examination	" 3
" " cross-examination	" 11
" " recalled	" 65
Edwin O. Eshelby, direct examination	" 17
" " cross-examination	" 38
" " redirect "	" 64

39 United States Circuit Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN CO.
vs.
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO. } No. 4226.

FRIDAY AFTERNOON, *February 7th*, 1890.

Testimony on Behalf of the Defendant.

G. N. CLAPP, being first duly sworn, testifies as follows:

Direct examination.

Mr. DIENST:

Q. I will ask you to state your name, age, residence, and occupation, Mr. Clapp.

A. G. N. Clapp; president and secretary of the Middletown Gas Co.

Q. I will ask you to state whether your company has been engaged in the purchase and rental—purchase for sale and rental—of the Siemens-Lungren lamp of the Chicago company.

—. ——.

Q. Now, Mr. Clapp, you are acquainted with the Siemens-Lungren lamp that is protected by the patent of the Philadelphia company.

A. Yes, sir; I am familiar with the lamp of that name.

Q. Now, you can state as to whether your company purchased any lamps protected by that patent; and, if so, the amounts, dates, and from whom.

A. I would have to have my books for that.

Q. Will you kindly take your books, refer to them, and answer?

40 A. Yes, sir; November 11, 1887, we purchased two lamps of the Siemens-Lungren Co. of Chicago; Dec. 12th, we purchased two lamps of the same company; January 16, 1888, we purchased two lamps of the same company; January 28, 1888, we purchased three lamps of the same company; that is all the lamps we purchased of the Chicago company. In November, 1888, we purchased eight lamps of the Philadelphia company.

Mr. KRAMER:

Q. That is after this suit was brought? That is Nov., 1889, isn't it?

A. No, sir; that was in '88. December, 1888, we purchased 24 lamps of the Philadelphia company; August, 1889, we purchased 53 lamps; Sept., 1889, 24; and December, 1889, 4 lamps; that is all.

Counsel for plaintiff object to the foregoing answer and move that it be stricken out.

Motion overruled and testimony allowed to go in, subject to exception.

Mr. DIENST:

Q. What is the total?

A. That is 122 lamps altogether.

No cross-examination.

41 WILLIAM SMITH, called on behalf of defendant, being first duly sworn, testifies as follows:

Direct examination.

Mr. DIENST:

Q. Mr. Smith, please state your full name, age, residence, and occupation.

A. William Smith; 35; Newport, Ky.; gas-fitter.

Q. In whose employ are you, Mr. Smith, and for how long have you been in such employ?

A. I am in the employ of the Siemens-Lungren Gas Illuminating Co. of Cincinnati, and I have been in their employ since last October a year ago.

Q. State what your duties are there.

A. My duties are to put up lamps, take down lamps, put lamps in repair, and clean them.

Q. I will ask you to state, Mr. Smith, whether or not you know of a lot of ninety-two lamps which were sent by the Siemens-Lungren Company of Chicago to the Cincinnati company.

Q. I will ask you, Mr. Smith, if you know of a lot of ninety-two lamps being now ordered with the Siemens-Lungren Company of this city?

A. Yes, all except one that was sent back to Philadelphia.

Q. Did you see any of the lamps in use?

A. Yes, sir; I put them up and took them down again—replaced them with better lamps.

42 Q. State to the court and jury what the character of the lamp was, what the action of the lamp was, how it acted when burning, and all about it.

A. Well, it was not made like the other lamp; there was an air passage in it that made the lamp flicker and smoke, and people would not have them, so we had to take them down and replace them with better lamps.

Q. What was the difference between this lamp and the lamp with which you replaced them?

A. These lamps had an air passage here that caused the lamp to smoke and blacken, and the light was so unsteady, and this would blacken up so and the light would go out, that the people would not have them and we had to take them down.

Q. You responded to the complaints when made?

A. I did; yes, sir.

Q. And you made a personal inspection of these lamps whenever complaint was made, did you?

A. Yes, sir; I did.

Q. Do you know in how many instances you took out lamps of this kind?

A. No, sir; but it kept me going right along from the start after *after* we put them up.

Q. Can you give the names of any of the parties where you removed these lamps that you say gave dissatisfaction?

A. Well, the names of all of them will appear on the books.

Q. Hav-n't you a memorandum with you of names that you dictated, giving the names of some of them?

43 A. Yes, sir; I dictated these to Mr. Eshelby.

Q. I will ask you to identify that list. Is that the list?

(List handed witness.)

A. Yes, sir.

Q. Now, Mr. Smith, read the list, please, to the jury.

A. J. S. Bertoli, 67 Walnut street; he had two lamps and we had to take them out because they smoked.

Q. This same lamp?

A. Yes, sir; we have them in the shop now. We took those two lamps down and put up two other lamps. William Boehm, 705 Elm street; his lamp smoked, and we had to take it down and put up another.

Q. You put up one of the other construction?

A. Yes, sir; L. E. Eisenschmidt, York and Madison streets; he was so dissatisfied with the lamp that we had to take it out and he would not try the other lamp.

Q. So he has never had a lamp since?

A. No, sir; Adolph Engler, 73 York St., Newport.

Q. Never mind those from Newport.

A. John Roeslein, Pearl and Ludlow streets; he had two lamps, and they smoked and we had to take them out. J. B. Du Case, 121 York street. Barnet Poppe, 444 Colerain avenue; he wouldn't have no lamp put in; we had to take his out, and then he wouldn't have no lamp in its place. It smoked so bad, he wouldn't have no other. H. Hock; he wouldn't have no other lamp in place of the one we took out. C. Shöllhamer, 407 Walnut St.; he wouldn't have the lamp. It smoked up his ceiling and he wouldn't have the lamp. Louis Ahn, 56 12th St. It smoked, and we had to take it
44 & 45 out. A. Warren, 278 West 6th St. It smoked and did not give satisfaction, and he would not have it, so we had to take it out. F. Schneider, 646 Race street; we had to take his lamp out. Neither of those parties would have another lamp put up.

Q. Now, Mr. Smith, in each of these instances I understand you to say that it was one of these ninety-two lamps that gave the dissatisfaction?

A. Yes, sir; in the meantime we didn't have any twelve-foot lamps and we had to put these up. It was during Christmas week and we were very busy and had a good many calls for lamps and we didn't have any of the 12-foot lamps, so we had to put these up, and thought they would do until we got the others, but the parties wouldn't have them. They smoked the globes and the smoked up the ceilings and flickered, and they had to be taken out.

Q. Were there any other lamps in use out of that lot of ninety-two other than those you have testified about?

A. Yes, sir; but I could not dictate them now.

Q. Are they still there—still in use?

A. No, sir; we had to take them out when we got the new 12-foot in.

Q. I will ask you to state whether or not your removals were made without complaint.

A. They were made with complaint. We told them to keep the lamp until we would get our other 12-foot in. It was during Christmas week and the people wanted the lamps, but they gave so much dissatisfaction that we had to take them out as soon as we could.

46 Q. You may state whether or not, after you had retired the lamps from use, there was any time when you tried to make use of them.

A. Yes, sir; I have fixed them up and plastered them up and done all I could to make them work right, because we had no other 12-foot lamp, and I wanted to make them do until we got out 12-foot lamps, and I tried to fix them up with plaster to make them burn.

Q. So that you did try to make them burn and work satisfactorily?

A. Yes, sir; in every way I could.

Q. Well, you may state to the jury as to how they acted after you fixed them up.

A. They acted just long enough—until they commenced to leak again. This air passage would let the air in, and that would make the lamp smoke. That plaster would not last long, and then the lamps would begin to flicker and smoke again.

Q. Then that would necessitate a new lamp?

A. Yes, sir.

Q. Have you any in use now?

A. Yes, sir; several around in different places.

Q. Where?

A. I could not locate them.

Q. How many are in use now?

A. 12 or 15, I guess.

Q. Did you have any complaints of those twelve or fifteen that you say are still in use?

47 A. Yes, sir; right along.

Q. Notwithstanding the complaints, you have keep them there?

A. Yes, we do the best we can with them.

Q. I will ask you in regard to another matter: You may state to the jury whether you are acquainted with a lot of 250 lamps shipped in August.

A. Yes, sir; I unpacked them.

Q. Can you state as to the character of the burner of that lot of lamps?

A. Yes, sir. We got a solid metal burner from them, and it was no good; and we sent them back, and then they sent this other burner—these other burners—on.

Q. Just take these, Mr. Smith, and examine them——

Objected to by counsel for plaintiff. Objection overruled. Exception reserved.

Q. Please examine those burners, Mr. Smith, and state and explain to the jury the difference in their construction. Take the tube burner first.

A. This is the burner that we had the trouble with. This forms a drop here—forms a sediment; this burner has not got any, and when it drops in it goes into the hole; we have had these burners in stock. Now, this burner (tube burner) we didn't have any trouble with, because it didn't have any drop; and this tube burner is the only burner that burns right.

Q. This tube burner is the first burner you had in stock, is it?

A. Yes, sir.

48 Q. You know about that, do you?

A. Yes, sir; I know that.

Q. Then this solid metal burner was subsequently received?

A. Yes, sir.

Q. And how do you say this solid metal burner acts?

A. I *aat* that it goes down in here and forms a sediment, and gets closed up, and makes the lamp smoke.

Q. How does it act upon the light?

A. Well, sometimes, after burning for 24 hours, it smokes and produces a one-sided light.

Q. I will ask you, Mr. Smith, where this solid metal burner has been in use, as to whether or not there has been complaints?

A. Yes, sir; wherever we could displace this metal burner with a tube burner we have done so; and the boys were very glad when they were replaced with the tube burners, because they has so much trouble cleaning them.

Q. I think I have asked you before, but you may state to the jury how many of the lot of 92 imperfect lamps you have now in stock.

A. Well, that I could not state exactly; I think there are 12 or 15 still in use, and the balance are lying there.

Q. You attend to the repairing of the lamps, do you?

A. Yes, sir.

Q. Who else have you to assist you?

A. A young fellow that helps me.

Q. There are two of you engaged in putting up lamps and keeping them in repair?

A. Yes, sir.

49 Cross-examination.

Mr. JACKSON:

Q. You say you were employed by this Cincinnati Co in October, 1888?

A. Yes, sir.

Q. How many of these defective lamps were in use at that time?

A. Well, I suppose I have taken down in the meantime about 50 of them.

Q. Are you able to give us the names of anybody else, except those that you have already given, where you replaced the lamps with better ones?

A. No, sir; I didn't keep any memorandum.

Q. How did you happen to keep a memorandum of these parties that you have read to the jury?

A. These are the ones that I have taken out just lately—within a week or two back.

Q. Then these lamps have been in since October, 1888?

A. No, sir; only since just before Christmas. We had no other twelves to put up, so I tried to fix these to make them do until the others would come.

Q. Then, notwithstanding the fact that your company knew that they were defective, your company put them in?

A. We had to.

Q. Then they were only taken out since last Christmas?

A. Yes, sir.

Q. Had you ever taken them out any place before?

A. Yes, sir; during the year back.

Q. So that you have been going through a process of taking out and putting in these defective lamps right along, have you?

50 A. Yes, sir.

Q. So that you have been making use of them——

A. We only made use of them during Christmas week, when the people were in a hurry for their lamps and we had no twelves. We put these up and tried to make them do until we got the others in, but they would not work, and the people complained so much that we had to take them out.

Q. Well, you have complaints about the other lamps, hav-n't you?

A. No, sir; only about the solid metal burner.

Q. Did you ever have a complaint from the F——?

A. No, sir; only about the burner.

Q. You are sure of that?

A. Yes, sir.

Q. Mr. Smith, how do you know that there were 92 lamps in this lot?

A. I counted them over.

Q. How many of those lamps are——

A. I used to have to take stock, and we called those old lamps there—we counted them—and I know that there was 92 of them.

Q. How many of those lamps are in stock now?

A. Well, I couldn't tell that exactly.

Q. About how many? Let's have your idea.

A. I suppose about 75 or 80 of them are in stock now.

Q. Now, Mr. Smith, how do you know that those 75 or 80 lamps formed a part of the lot of 92 lamps?

A. Because when I came there they were all packed up and was not in use.

51 Q. Had they not been in use?

A. Yes, sir; some of them had, but they had to be taken out.

Q. You never shipped any back, did you?

A. No, sir.

Q. What was the matter with that lot of lamps?

A. Well, it has an air passage which causes the lamp to smoke and blacken up the globe, and wouldn't burn satisfactorily.

Q. Don't you know, as a matter of fact, that the burner of that lamp is precisely the same as the burner on that other lamp?

A. We put any burner on the lamp; we have three different ones.

Q. Are those burners precisely alike? Is not the governor just the same?

A. It is; yes, sir.

Q. And the flame plate, isn't it just the same?

A. Yes, sir.

Q. And the only difference is the casting between that and any other lamp?

A. Yes; the body of the lamp, the construction.

Q. Where is that passage that you speak of, that lets in the air?

A. I couldn't exactly tell you until I would show you the lamp. There is a passage that goes clear through there; that passage should not be there; therefore, I have stopped some of them up with plaster Paris.

Q. You don't know whether that lamp was any different from the lamps received in the spring of 1888 or not, do you?

A. Why, yes; the lamp we received then was a good lamp.

Q. You were not there then, were you?

A. No, sir; I was there in October.

Q. Then, if you were not there, you do not know what kind

52 of lamps they were getting in the spring of 1888?

A. Only by what I saw around the town that they had put up.

Q. Is it not a fact that the difference that you are speaking of is the difference between those old lamps and the lamps you have been getting from Philadelphia?

A. Why, certainly; there is a difference between them.

Q. That is the difference you are talking about?

A. Yes, sir.

Q. Ever since you have been in the employ of the company they have got their lamps from Philadelphia?

A. That I do not know.

Q. You say the trouble with this burner is that it has not a place to catch the sediment?

A. Yes, sir; that and the air passage.

Q. This is the solid metal burner?

A. Yes, sir.

Q. Now, then, this trouble with this burner is not a trouble owing to the difference between the tubes and the solid metal burner, but to the depression here?

A. Of course, that has a heap to do with it; but you see this here oozes and forms a sediment here; the solid burner metal will do that, but the tube burner will not.

Q. You do not know, do you, Mr. Smith, what was the most approved form of lamps in July, 1888?

A. Only what I saw in stock.

Q. There is no trouble with these lamps except with this burner, about this new lamp, is there?

A. That is all.

Q. Otherwise the lamp is all right?

A. Yes, sir.

53 Adjourned until ten o'clock, Monday morning, Feb. 10 1890.

Met pursuant to adjournment.

EDWIN O. ESHELBY, called on behalf of the defendant, being first duly sworn, testifies as follows:

Direct examination.

Mr. DIENST:

Q. Mr. Eshelby, please state your full name, age, residence, and occupation.

A. Edwin O. Eshelby; Cincinnati; at present I am connected with the Cincinnati Siemens-Lungren Gas Illuminating Company as president.

Q. You may state how long you have been connected with that company.

A. Since its organization.

Q. I will ask you to state whether you have an account which was rendered in this case sued upon—whether you have a copy of it?

A. I have; yes, sir.

Q. I will ask you to refer to the last two items of that account—two hundred and fifty lamps furnished—and will ask you to state the price at which they are charged there.

A. For the 8-foot, $17.50; for the 12-foot lamps, $19.00

Q. Is that net?

A. Yes, sir.

Q. I will ask you to look at this account attached to the deposition taken at Philadelphia; refer to that account and state what charges are made there and for what lamps.

Mr. KRAMER: We will agree to that.

54 Mr. DIENST:

Q. I will ask you, Mr. Eshelby, to state about the shipment to your company of a lot of one hundred lamps made by the Chicago company, and I will ask you to state whether or not that lot is the same lot testified to by Mr. Smith.

A. Yes, sir; it is the same lamp. You mean the fraudulent lamps?

Q. Yes.

A. Yes, sir.

Q. I will ask you to state about when the shipment was made.

A. I think the shipment was made either in January or February. I think it was made in February, 1888; either then or in January.

Q. Upon the shipment being made to you, when you received the lamps what did you do with them?

A. We commenced to put them out in the course of our orders—in the transaction of our business.

Q. And what occurred to them in the way of complaint from those using them?

A. We had a great many complaints about that time, and we could not tell what was the cause. Some of the lamps gave us no trouble at all and others did. Finally, the lamps were so unsatisfactory and we had so many complaints from parties using them that we were compelled to retire them after we had entered into a contract in one or two cases, and later on—do you want to know how we discovered——

Q. Just state what you did.

55 A. Later on, in July of the same year as this purchase, the account that they are suing on, two hundred and fifty of them came from Philadelphia; and about the time that we were receiving them we got a telegram from Philadelphia asking us——

Objected to by counsel for plaintiff.

Q. Mr. Eshelby, I am speaking about the one-hundred lot, not the 250. Just go on and state what you did and how you discovered the damage.

A. I am coming to that. We got these 250 lamps from Philadelphia, and they were followed shortly by the engineer of the parent company—the engineer of the Phila. Co. He came out here—Mr. Gardner came out here—and he said——

Objected to by counsel for plaintiff. Objection sustained.

Q. Just state what you did.

A. Well, I discovered in June or July that they were fraudulent; that they were not the same lamp as those we had been using.

Q. State how the lamp acted.

A. Well, it would smoke, and the flame would go out, and it would discolor the globe and the plate around it, and, in fact, some of them would burn a whole evening and others, again, would black up so that no light could be obtained in a very few moments.

Q. State how many of these lamps you had in use.

56 A. We had all of them in position.

Q. State how many you retired upon discovering the defect and the smoky character of the lamp.

Q. We were ordered to return them all by Mr. Stein, president of the parent company.

Answer objected to by counsel for plaintiff as not responsive to the question, and motion to strike it out made. Motion granted. Answer stricken out.

Q. State how many of those lamps are retired after you discovered the defect and the smoky character of the lamp.

A. We retired all of them.

Q. State whether since the time that you retired them you ever made any effort to use them.

A. Yes, sir; we have tried to use them on two or three different occasions.

Q. For how long a period? You would put them up, and how long a period would they be up in use?

A. About 24 hours before we would get a complaint.

Q. When did you attempt to use them?

A. This last winter.

Q. I will ask you to state about what time, and what caused you to try them.

A. Well, we became very busy along in November and December, and we run out of all our good lamps on hand, and we had quite a number of orders for lamps, and we tried to make these other lamps do; but in nearly every case the lamps were ordered out. If you will hand me my book I will show you a lot of

57 contracts that we entered into. (Book handed witness.) It was in November. Here is a contract that we entered into with John Roeslein, of Pearl and Ludlow—contracts in relation to this fraudulent lamp.

Mr. KRAMER: These alleged spurious lamps?

A. Yes, sir. As I say, we ran out of good lamps and we put these up, and in nearly every case they were ordered out, and the contracts upon the part of the customers and ourselves were simply canceled and the lamps were withdrawn, because we could not replace them with other lamps, as we had run entirely out of the good ones.

Q. How many lamps are now in use—of these spurious lamps?

A. I should say 10 or 12.

Q. The remainder are all in your possession?

A. Yes, sir; and have been for a year and a half; since we retired them.

Q. How many lamps were there of that character?

A. One hundred.

Q. What was the amount that you paid for them?

A. Nineteen hundred dollars. That, of course, without freight and drayage.

Q. You may state whether or not you have ever had any complaint at the time when you were soliciting contracts for the purpose of putting in the lamps, any complaint from persons who objected to the lamp on the ground of its action.

Q. You mean the fraudulent lamp?

Q. Yes, sir.

A. I don't understand what you mean.

Q. What I mean is this: In soliciting new trade, did you meet with any objections from persons on account of the action of
58 *of* this lamp——

Q. Now, you may state, with reference to the shipment of this last lot of two hundred and fifty lamps, what class of burners was shipped with that lamp.

A. What is called a solid metal burner.

Q. State what burner had been shipped with the lamps prior to that time.

A. What is called a tube burner.

Q. State the action of the solid metal burner. How did it act?

A. Let me have the burner and I can illustrate it to you. Burner handed witness). The first lot we got was this burner. Bringing the gas there, it would carbonize on top here, and would not permit the flow of gas around here at the bottom, and it would become so hard that we could not get the — through, and that caused the cutting off of the light at that side, so that often there would be a steady blaze at one side while at the other side there would be no blaze at all. When we found how it acted, we could not fill orders with that burner. The most of them were returned to us. They then sent us this burner, which is about the same as the first one, with the exception that it is curved out here. It is like the solid metal burner. This is called a solid metal burner, and this a metal burner. The regular burner that we always did get and now
59 get is this tube burner. We never had any trouble with the tube burner.

Q. Now, Mr. Eshelby, you may state how the other burner acts. Are you able to keep it in places?

A. No, sir; we don't attempt to; we can't do it at all; we had to replace it with the tube burner.

Q. State whether or not you have all of the 250 of the solid metal burners on hand.

A. I think so; yes, sir.

Q. Let me ask you, Mr. Eshelby, whether you have ever tried to effect a change of this burner.

Objected to by counsel for plaintiff. Question changed.

Q. I will ask you whether you have ever tried to effect a change with the Chicago company of these burners.

A. No, sir; the Chicago Co. was not in business.

Question and answer objected to by counsel for plaintiff, who move to strike them out. Objection sustained; question and answer stricken out. Exception reserved by counsel for defendant.

Q. You may state whether or not the Chicago company is now out of business—no longer having the agency for the Philadelphia company, has notified you to deal directly with it, and that you are dealing directly with it.

Objected to by counsel for plaintiff.

The COURT: Mr. Eshelby, if you know of your own knowledge that the Chicago co. is out of business, you may testify that.

A. I do not know it of my own knowledge.

Objection sustained.

60 Mr. DIENST:

Q. You may state whether or not, ever since the items in this last account, you have not purchased your goods directly from the Philadelphia company.

Objected to by counsel for plaintiff. Objection overruled.

A. Yes, sir; we have purchased everything from the Philadelphia Co. since July, 1888—July or August, 1888.

Q. You may state whether or not you have ever had any complaint from the Chicago company about your direct action with the Philadelphia company?

Objected to by counsel for plaintiff. Objection sustained. Exception reserved by defendant.

Q. I will ask you to state how many burners there were—250 burners?

A. Yes, sir; 250.

Q. Let me ask you when you first notified the plaintiff company about their violation of the contract between the Cincinnati company and the Chicago company—when you first notified the Chicago company in regard to their shipment of goods into Middletown.

A. Well, the only evidence appear of the first notice was February 11th, according to the letter book.

Q. Have you your letter book here, and can you refer to it and state the date?

A. The letter book is not here, but it has been sent for and will be here in a few minutes. I know that it is February 11th, though, for I have a copy of the letter here.

61 Mr. KRAMER: We will admit the copy.

Mr. DIENST:

Q. Have you the copy with you?
A. Yes, sir.
Q. Read it, please, to the jury.

Letter was read to the jury, is hereto attached and made part hereof, marked "Exhibit No. 1."

Q. You may state whether—what are the usual terms of contracts entered into for the renting of the lamps, or the selling of the lamps, between yourself and the persons engaging the lamp?

Objected to by counsel for plaintiff.

A. Shall I read the correspondence?
Q. Just state the facts.
Q. You mean in regard to this Middletown business? Well, after some negotiation we offered to rent them, or sell them, the lamps for $35, or rent them to them to net us one dollar a month, or twelve dollars a year.

The COURT:

Q. That was before the sale by the Chicago company?
A. That was between sales.
Q. And they refused to deal with you then?
A. The Middletown Gas Company? Yes, sir.

The COURT: Well, I will sustain the objection and rule that testimony out.

Exception reserved by counsel for defendant, who states
62 that he expected to prove by this witness as follows:
That defendant rented its lamps for the period of a year at the rate of $12 per year per lamp, and sold such lamps for the sum of $35 per lamp at the end of year; that all its lamps were so rented and sold, and that no other terms were ever entered into by it with renters and purchasers.

Mr. DIENTS:

Q. Now, Mr. Eshelby, I will ask you about the repairs which you have made to these lamps. You may state whether or not you have purchased any materials for the purpose of making the necessary repairs to the lamps which have been furnished you from time to time by the Chicago company.
A. Yes, sir; we have.
Q. And, if so, state how much and to what amount the material has come.
A. I made a list here in the book; there it is. Shall I read it?

The reading of the list objected to by counsel for plaintiff. Objection overruled. Exception reserved.

Q. Go on, Mr. Eshelby.

A. Feb. 6, 1888, $12.00, twelve flame plates.

Q. Well, keep on reading the invoices and state the character of them.

A. Feb 17 they shipped us a lot, but made no charge for those. The next is April 6, 1888, $24.00 for 24 flame plates; April 18, 1888, $118.74—that is for asbestos, rings, governors, burners, flame plates, and by-pass cocks; August 15, 1888, $4.15—that is the Philadelphia company—one can chyzal, powder, and plumbago; October
63 25, 1888, $96.75 for twelve dozen flame plates.

The COURT:

Q. What is a flame plate, Mr. Eshelby?

A. That goes up into the lamp and burns out. The next is Nov. 13, 1888, two cans chyzals, two cans solution, four dozen catches, $12.14.

Mr. KRAMER:

Q. What is chyzal?

A. Chyzal is the white substance that is mixed with the solution that we whiten the bottom of the lamp with.

Q. What are the catches?

A. The catches are—well, for instance, a lamp goes out and may *brake*——

Q. Used to shut the flame off and on?

A. No, sir; I think to take the globe out; I think it is the globe-holder.

Mr. DIENST:

Q. Go on reading the list, please, or have you finished all?

A. No, sir; I hav-n't read all. The next is January 12, 1889, 12 doz. asbestos cylinders, 12 hinges and screws, 150 Lungren governor washers, $13.11; Feb. 2, 1889, one large can chyzal and solution, $4.00; March 1, 1889, 8 doz. asbestos rings, $7.12; March 16, 1889, two cans chyzal and solution, $4.00; April 12, 1889, 60 flame plates, 12 ft., and 60 16-ft. flame plates, three cans chyzal and solution, $73.20; June 1, 1889, flame plates, governor-washers, chyzal and solution, $27.59; June 17, 1889, globe-holders, hinges, and catches, $6.95; Sept. 27, 1889, flame plates and chyzal, $62.00; Octo-
64 ber 8, 1889, catches and pins *and pins*, drip connections, $11.90.

Mr. KRAMER:

Q. Mr. Eshelby, does not that include some items that are not in the nature of repairs?

A. I will correct my former statement of October 8th. Instead of $11.90 it should be $2.22; October 28, 1889, asbestos cylinders, chyzal, and solution, $31.10; December 13, 1889, perforated buttons, chyzal, and solution, $9.02; December 26th, 1889, flame plates and cylinders, $81.44; December 27th, 1889, chyzal and solution, $4.00; January 17, 1890, $20.90; total, $616.46.

Mr. DIENST:

Q. That covers what period of time?

A. From Feb. 6, 1888, to January 17, 1890, inclusive.

Q. State whether or not these repairs were to the lamps furnished you by the Chicago company.

A. A portion of them were.

Q. I will ask you to state whether or not, as the lamp grows older and remains in service longer, there is an increase in the cost and in the repairs.

Question objected to by counsel for plaintiff. Objection sustained. Exception reserved by counsel for defendant.

Counsel for defendant expects to prove by witness that the cost and expense of keeping the lamps in repair would increase as the lamps grew older and remained in service longer.

Q. You may state how much of this is applied to the lamps purchased from the plaintiff company—of these expenses, I mean.

65 A. Do you mean to the one hundred lamps or to the 350 lamps—all of them?

Q. I mean what you purchased entirely from the Chicago Co.?

A. They were all purchased from the Chicago Co.

Q. All of them?

A. Yes, sir.

Q. Then that $614.46 has all gone into the lamps purchased from the Chicago company?

A. Yes, sir.

Q. Have you a lamp here, so that you can show?

A. Yes, sir.

Q. Now, just state what portion—the globe goes in here, does it?

A. Yes, sir.

Q. And is hung down that way?

A. Yes, sir.

Q. Where is the flame plate?

A. The flame plate comes in here.

Q. The flame plate is enclosed by the globe?

A. Yes, sir.

Q. And the burner is attached there, is it?

A. Yes, sir.

Q. And what do you call this white?

A. That is the chyzal and solution that goes on there.

The COURT:

Q. What is that material—that white—there?

66 A. It is a material made from the chyzal powder and the solution that is sent.

Q. That is an incombustible?

A. Yes, sir.

Q. Then the flame goes up and encircles that plate?

A. Yes, sir.

Mr. DIENST:

Q. Mr. Eshelby, you may now state about the bye-pass lever. When was that first furnished to your company by the Chicago Co.?

A. We never received any from the Chicago company.

Q. Did you ever receive any from the Philadelphia company?

A. Yes, sir.

Q. Were they in exchange for the old-style lamp?

A. Yes, sir; I would like to correct myself in regard to that. I am not positive as to this lot we got, whether they had bye-pass levers or not, but I think they had. This 250 which was billed to us from Chicago but came from Philadelphia.

Q. How many were in exchange for the old lamp?

A. All of them.

Q. Do you know the quantity—how many there were of them?

A. Well, there were—I could not say now; I could not tell exactly. I am not clear as to the last lot, but I should say seven or eight hundred, or eight to nine hundred.

Q. Do you know when the exchange was first effected—commencing at what date?

A. Why, I guess it was in August or September, 1888.

Q. Can you state what it cost in dollars and cents to effect the exchange?

67 Objected to by counsel for plaintiff. Objection overruled. Exception reserved.

Q. You say between seven and eight hundred were exchanged?

A. No; I said between eight and nine hundred.

Q. This last lot of two hundred and fifty had the new improvement on?

A. I think they had; yes, sir.

Q. State how much of a force you have in your employ, Mr. Eshelby, to go around and make the necessary and essential repairs to these lamps?

Objected to by counsel for plaintiff. Question withdrawn.

Q. The testimony that you have given, Mr. Eshelby, related, of course, to the material that has gone into the lamps in making the necessary repairs?

A. Yes, sir.

Q. Let me ask you whether or not you can state the amount of labor—the cost of labor to you—for the purpose of making those repairs?

A. I cannot state it accurately. I can estimate it very nearly.

Objected to by counsel for plaintiff. Objection overruled. Exception reserved.

Q. Approximate, during the same time—covering the same period of the time.

A. Well, we had one boy that we had to employ just to attend to this. We paid him $4.00 a week; that was along during the summer. He just did nothing else but this; that was a total of
68 *of* $44.00. We keep five boys, and we set aside Saturday for overhauling and repairing the lamps and cleaning them, together with the gas-fitter. I would estimate that about one hundred days in the two years—about two years—a little over two years. Do you want to include in that the change of the bye-pass levers?

Q. No; I am only referring to the repairs on the new lamps.

A. On Saturdays, we always took the Saturdays to call in the boys off the routes, together with the fitter and his helper, to overhaul and clean up the lamps.

Q. Well, have you approximated it?

A. That is a total of $571.34, the one hundred days of the fitter; and the boys get $4.00 a week, at sixty-six and two-thirds cents a day; and the fitter we have never paid less than $2.50 and as high as $3.50 a day; that makes a total of $517.34, and the boys, $277.31, and the gas-fitter one hundred days, at $2.50 a day, would be $250.00.

Q. That is for the same period of time, is it, from February 6th, 1888, to about January, 1890?

A. Yes, sir.

Q. Now, I will ask you to state, if you can, the cost of making the change from the old-style lamp to the bye-pass lever.

Objected to by counsel for plaintiff. Objection overruled. Exception reserved by plaintiff.

A. Well, I estimated—we figured that the expense of changing was about $1.00 per lamp. Of course, we could not go into a
69 man's place of business and take out his lamp. We couldn't take these levers out to his place of business and change the lamp there; but we would have to send a lamp out, take the old lamp down and take it to the shop to be fixed. Every case—possibly out in the suburbs we would have to send a lamp out, have the old lamp brought in to the shop and then sent out. So that we estimated the time and labor at about one dollar a lamp; in some cases it was really a great deal more, and in others a great deal less, of course, according to the locality; but we averaged that it cost us about one dollar a lamp to make the change.

Cross-examination by Mr. KRAMER:

Q. Mr. Eshelby, do you know of your own knowledge when this bye-pass lever was first invented or discovered by the parent company?

A. I do not; but we had complaints as early as——

Q. No; you misunderstood my question. I asked if you know of your own knowledge when this bye-pass lever was first invented or first introduced by the parent company?

A. No sir; I don't.

Q. Don't you know as a fact that the lot that you got from the Philadel-hia company of 250 lamps, which is the last item in our account, is the first time that is was introduced?

A. I do not, sir.

Q. Don't you know that the president and secretary of the company have so announced and declared?

Objected to by counsel for defendant.

Question withdrawn.

70 Q. You personally do not know when it was first introduced?

A. I do not. I know that was the first time we got it.

Q. You have stated to the jury, from your invoice books, items of expense for repairing lamps from Feb. 6, 1888, to January, 1890. Are you able to portion out of that list the expense that you were put to concerning lamps from Chicago? I mean excluding the two hundred and fifty lamps furnished you from Philadelphia.

A. They all went into them.

Q. Do you mean to tell this jury that you have had no expense for repairing lamps since August, 1888?

A. We hav-n't bought any lamps since then from the Philadelphia company.

Q. Where have you bought them?

A. I think we bought two——

Q. Do you mean to say that you have bought no lamps from any other source since August, 1888?

A. Yes; we bought one lot.

Q. How many lamps in the lot?

A. Here is the invoice. It may be that I can tell you just when we bought them. November 23, 1888, we bought 75 lamps.

Q. Did any of those seventy-five lamps need any repairs since 1888?

A. I suppose they did.

Q. Can you tell the jury what portion of this bill of items applies to these 75 lamps?

A. Well, I suppose $\frac{75}{1126}$, allowing for the fact that they were new lamps.

71 Q. Do you mean to say that you bought 1,126 lamps?

A. Yes, sir.

Q. And all of them came from Chicago except 75?

A. Yes, sir; I think we got the — from them, possibly.

Q. What do you mean by —?

A. That is just like that, you might say, with the exception that in the center there would be one of these lamps.

Q. About how many of those — were there?

A. I think there were five.

Q. And you will not say that those five did not require some of those repairs that you have charged for on this account?

A. Yes, sir; because we sold one immediately after getting them and we have two in the office.

Q. Did they require any repairs?

A. Nothing, with the exception of the flame plates.

Q. Didn't the — req-ire the same degree of the attention that the other lamps did?

A. Yes, sir.

Q. So that part of this expense went on these —?

A. Yes, sir.

Q. And the same is true in regard to the other items of repair, labor, &c.?

A. Yes, sir.

Q. And you are not able to definitely ap-ortion the expense?

A. No, sir; I am not.

Q. You kept no account?

A. No, sir.

72 Q. And you have only bought 75 lamps since August, 1888?

A. That's all.

Q. With regard to these bills that you have referred to in the invoice book—from February 6th, 1888, to August, 1888, being the time when you ceased to do business with the Chicago company—is it not a fact that the terms are stated as being "net cash"? Take the first one, for example, and you need not refer to any others—February 6th, 1888.

A. Yes, sir.

Q. You paid for that, didn't you, to the Chicago company?

A. We had some difference, and it was let go over. The Middletown commission was one of them. We kept paying the drafts as they were drawn upon us, with the understanding that we would settle these differences. We had one settlement here——

Q. What date is that? You got a credit on the bill of 1887 for one lamp there, and repairs on lamps——

A. Yes, sir.

Q. There is no credit there for any repairs?

A. No, sir.

Q. So that it is a fact that all of those items of flame plates, chyzal, and solution, and all the other items from Chicago from Feb., 1888, to August, 1888, for which you have now charged these items, that they were billed to you as net cash, and you have paid for them?

A. No, sir; right after billing that first item of February 6th—on February 17th—they sent us a lot more, and made no charge for them.

Q. With that exception didn't you pay for all the balance?

A. Yes, sir.

73 Q. Will you explain to this jury if the Chicago company were to defray all the expense of these repairs why you paid for them—why you kept on ordering them and paying for them if the Chicago company were to furnish you those repairs and defray all the expense of those repairs?

A. Well, I cannot explain it.

Q. Did you ever write a letter to the Chicago company or notify

its officers at any time that there was an erroneous charge, and that they had——

A. I had a conversation with Mr. Wolf. There had been a change in time, and we didn't get the lamps as promptly as we ought to. I can show you a letter here where they say to please honor drafts and later this will be corrected.

Q. Have you those letters here?

A. Yes, sir; this March 9, 1888, is one of them.

Letter read to jury, introduced in testimony, and made part hereof, marked "Exhibit No. 2."

Q. Do you know of any others before I read this to the jury? I am now talking of any complaint you made.

A. Here is one, August 15th, 1888; a complaint in reply to theirs of the 14th.

Letters read to jury of Chicago Co. and Cin. Co.'s reply, dated, respectively, Aug. 14 and 15, 1888, made part hereof and attached hereto, marked "Exhibits Nos. 4 and 3" respectively.

Q. Is that the only one that you know about in which you made any complaint as to their charging you with these items of repairs? Then show this jury a letter of complaint sent by you to the Chicago Co. complaining that they were charging you with these items of repairs and you were paying for them under an erroneous idea of your relations with them.

A. We did not complain to them until this letter.

Q. And that is after you would not pay their draft of Aug.,
74 1888?

A. Yes, sir.

Q. Will you please explain to the jury, Mr. Eshelby, why it is that if, as you now claim, they were obliged to make these various repairs on your lamps, why it is that you paid for them?

A. We only paid one or two items.

Q. Didn't you pay every bill they rendered you for flame plates, chyzal, and solution, and the various items that you have enumerated, except this one for $12.00, from Feb. to Aug., 1888?

A. We got three items from February to August, one of $12.00 and one of $118.74.

Q. The $12.00 item of February 6th, 1888, was credited back to you?

A. No, sir; we never got a credit item for $12.00.

Q. Didn't you pay them on April 18, $118.74?

A. Yes, sir.

Q. If you did not have to pay for the items why did you do so?

A. We paid for those three items—February 6th, $12.00; April 6th, $24.00, and April 18th, $118.74—before we discovered that we were not getting the benefit of our contract.

Q. If the Chicago company were to defray the expenses of furnishing these various things and you knew that, and they charged you with $119.74 on April 18th, why did you not object to it?

A. We paid for that under a misapprehension of what possibly

we were entitled to; then we began to look into our rights, and then that letter, just read here, was sent to them.

75 Q. Will you please find your letter of March 7th, 1888, to which this is a reply?

A. Yes, sir; I have it here.

Letter read to the jury by Mr. Kramer introduced in evidence. Copy attached hereto made part hereof as "Exhibit No. 5."

Q. Now, that is the letter to which you got this reply of March 9th, in which you say you made an account of repairs?

A. No; I didn't say that.

Q. You make no claim in this letter——

A. No, sir.

Q. Didn't you say you made a complaint in a letter, in reply to which they said that they would make an allowance later for the repairs——

A. I don't wish to be so understood. I said——

Q. And is not this the letter in which you claim that they said they would make an allowance? Is not this the letter?

A. Yes, sir; but——

Letter of March 9th, 1888, from the Chicago company to the Cincinnati company in answer to letter of March 7 (in letter-press book), read to jury. Copy already attached hereto made part hereof and marked as "Exhibit No. 2."

Q. Now, Mr. Eshelby, you have complained of paying $44.00 for the wages to this boy. How many weeks was he in your employ in making repairs?

A. We had him with us 11 weeks.

Q. Do you mean to say that he devoted his entire time to the performance of repairing the lamps from Chicago?

A. He was engaged expressly for that purpose; but, as I said, these lamps were all in together. We didn't pretend to keep

76 a separate account, and whatever amount of the expense for repairs would be apportioned as seventy-five is to one thousand—one hundred and twelve.

Q. What is the name of that boy?

A. Lewis Reiner.

Q. Where is he now?

A. In our employ.

Q. Had he been employed by you before he was put to repairing those lamps?

A. No, sir; he was engaged just for the purpose of repairing those lamps.

Q. Do you mean cleaning the globes?

A. No, sir; I mean repairing the lamps.

Q. Do you mean cleaning any part of the lamp?

A. Oh, yes, sir; that would be necessary.

Q. How old was this boy?

A. I should say he was 14 or 15.

Q. This boy would go around to the different places where these lamps——

A. No, sir; we kept him in the shop all the time.

Q. How could he get the lamps?

A. The fitter would bring them in to him, and he would repair them in the shop.

Q. Was it your custom to take down the lamps just for ordinary cleaning?

77 A. No, sir. I will show you. The boy carries out that flame plate and brings that back with him. This has got to be done while in the shop, because this has to be heated and two or three coats put on it, and when it comes to cleaning this and taking this out—this apart—then it has to be done in the shop. We have had a great many of these nick-led, but we have not included that here, because—it is not due to the damp, but we had a damp cellar. Still we made no charge for that; we just charged for material.

Q. You say you have a damp cellar?

A. Yes, sir.

Q. Is it not a fact that these 92 or 100 lamps were kept in that cellar?

A. Yes, sir; but this dampness was remedied. We discovered it and had it remedied, had it fixed.

Q. Is this one of the 92 lamps?

A. Yes, sir.

Q. The polish and burnishing is all worn off. By reason of being in the cellar?

A. No, sir; it is not owing to that.

Q. That boy was at work 11 weeks, you say?

A. Yes, sir.

Q. He is repairing lamps now, isn't he?

A. No, sir; we have stopped —.

Q. Why? Don't any of the lamps need repairing?

A. Oh, yes; but one of our boys left us suddenly and we put him on the route and then stopped.

Q. In regard to the 100 days in a period of two years, you say you employed 4 or 5 boys to go around on Saturdays?

A. No; they go around through the week.

78 Q. What did they do?

A. They clean the globes. The globes become smoked.

Q. Did they make any repairs?

A. Not any further than when a flame plate wears out.

Q. You don't claim that they made any repairs?

A. No, sir.

Q. But you charged for their services?

A. I will explain that to you. We have on our lamps that are up, we have to go once and sometimes twice a week and clean the globes. We have four or five boys that go these rounds, and we always set aside Saturday, unless there was an order that had to be attended to positively upon the part of the gas-fitter; but every one of our employés in the shop would go into the basement where

they would clean all the lamps that needed it. They devoted Saturdays to that—cleaning and repairing.

Q. Do you claim that those four or five boys made any repairs?

A. I claim that they assisted in making repairs.

Q. What repairing did they do?

A. Well, I cannot tell you that. The gas-fitter can tell you.

Q. Personally, you do not know?

A. No, sir; except that I know they were in the shop on Saturdays, and would frequently go out to help——

Q. Did you ever render the Chicago Co. any bill whatever for the labor of these boys at any time?

A. No, sir.

Q. You knew that these boys were making these repairs?

A. Yes, sir; I knew it.

79 Q. And yet you never at any time, from February 6 to August, 1888—did you render any bill for it to the Chicago company or let them know in any way that you had a claim against them for that?

A. No, sir; because it was only a period of four or five months that we did business with the Chicago company.

Q. When did you first commence with the Chicago company?

A. We commenced with the first Chicago company in November, possibly; bought 200 lamps and——

Q. When did you make the contract with them first?

A. Nov. 9, 1887.

Q. And you knew afterwards that the first company had sold out to the second company?

A. Yes.

Q. You knew that fact just as you knew that the Cincinnati syndicate, composed of yourself and Mr. Fleischmann, sold out to the other company?

A. Yes, sir.

Q. And you never made any charge to the Chicago company for the labors of these boys?

A. No. It was very little. It would have been only eight days' work.

Q. Referring to the items of 92 lamps, you said, I believe, that there were a hundred?

A. There were one hundred.

80 Q. You swore to this cross-petition, did you?

A. Yes, sir.

Q. You filed that paper in 1889. You certainly knew as much then as you do now——

A. No, sir; I did not.

Q. Did you personally examine the 92 lamps that you claim are imperfect?

A. I saw them taken apart—yes, sir.

Q. Did you know enough to know whether they were different from the other lamps?

A. No, sir.

Q. Do you know it now?

A. No, sir.

Q. You say that *there* were spurious because your gasman says so?

A. And the parent company says so.

Q. And some of your consumers complained of them?

A. Yes, sir. Every one of those lamps that we put out was complained of.

Q. Is it not a fact that they complained of some of the other lamps?

A. Oh, there have sometimes been complaints that they were dirty, or somethink like that, but the complaint was not daily, as it was with these lamps.

Q. Don't you have to take lamps out now?

A. There may be some. I should say there is not, but I don't know positively.

81 Q. Now, Mr. Eshelby, I will ask you this general question: Is not this a fact that this matter of introducing this patented article, this lamp, is a matter of experiment and some object to it for triffling reasons or because they prefer the other gas-light or electric light and occasionally you will find that there is something wrong with the lamp, but that generaoly it is complained of for some triffling reason?

A. No, sir; we always have, say, one hundred lamps up for parties trying them, and sometimes they say they consume too much gas or something of that sort; but that was not the case with these spurious lamps; they were complained of constantly, so that we were compelled to take them out.

Q. When did you first discover that these lamps, the 92 lamps, were defective?

A. In June or July, 1888.

Q. You got them in February?

A. Yes, sir.

Q. And you discovered that they were defective in June or July; can't you fix it more definitely than that?

A. The reason that I fix it in June or July is that it is whenever the engineer of the Philadelphia Co. came out here.

Q. Now, will you please explain why you did not send back these lamps as soon as you discovered that they were defective?

A. Yes, sir; because Mr. Stein brought suit against us for an infringement of the patent and ordered them in and told us to hold them and because negotiations with the Chicago company had ceased.

82 Q. Is it not a fact, Mr. Eshelby, that the suit of the Phila. Co. against you was long after?

A. Well, it may have been, but P—— & S—— said that they were going to bring suit.

Q. You discovered that these lamps were imperfect before you saw Mr. Stein?

A. Yes; through his engineer, Mr. Gardner.

Q. And didn't you know it before that through your gas-fitter?

A. No, sir.

Q. Who was your gas-fitter before Mr. Smith?
A. Mr. Corbley.
Q. Did Mr. Corbley take out any of those defective lamps?
A. Yes, sir; he took out a great many of them.
Q. During what months did he take any of those lamps out?
A. After the time that Mr. Stein ordered them out.
Q. Then it is only because Mr. Stein ordered them out that you took them out?
A. Yes; and then our consumers were complaining; we didn't know what was the trouble with the lamps; some seemed to be giving a good deal of trouble and others didn't; some of them smoked and some did not.
Q. Was that not true of the other lamp also?
A. Oh, no, sir.
Q. Have you ever seen this lamp smoke?
A. Yes, sir.
Q. Where?
A. In our office.
83 Q. You have now 12 or 15 of those lamps now in operation?
A. We have.
Q. How can you explain that to the jury, that you allow those lamps that are fraudulent, imperfect, and spurious, as you say, to remain out, or how is it that they are kept?
A. Because we have no good lamps to replace them.
Q. Your customers are satisfied with them?
A. No, sir; they are not.
Q. Well, they keep——
A. They are not satisfied; they are simply holding them until we can replace them with good lamps.
Q. Are you getting rent for them?
A. No, sir; we sold them.
Q. You have sold other lamps?
A. Yes, sir.
Q. And you sold them at the same price?
A. Yes, sir.
Q. And you sold them knowing that they were spurious?
A. We sold them with the understanding that we would replace them with good lamps as soon as we could do so.
Q. You cannot tell any more definitely than June or July that you first discovered that these lamps were imperfect?
A. I think it was July, because it was, I think, about the time we got up to the exposition.
Q. You said, if I understand you, that the fraudulent lamp gave trouble from smoking and that the flame went out and it discolored the plate?
A. Yes, sir.
Q. Did you ever at any time write to the Chicago company of this trouble about the lamp?
84 A. There is a letter, I think—I cannot say exactly what I said. The reasons for not paying their draft——

Q. Their last draft?

A. No, sir.

Q. Do you refer to the letter you read a little while ago?

A. No, sir; there is one after that.

Q. I am talking of from Feb. to July. Did you at any time between those months, when you had complaints of your gas-fitter or from your customers in regard to these lamps, make any complaint to the Chicago Co. of any kind, by letter or personally?

A. I don't recall now that I did; I may verbally.

Q. Do you remember when you paid for those 92 lamps?

A. Promptly on the 10th of the month.

Q. On 30 days' time?

A. No, sir; we paid promptly on the 10th of the month always.

Q. And you never made any claim for rebate until this suit was brought?

A. As I said, we were only in business with them—transacted business with them about two months. We opened the business here and then gave them an order, and then this trouble commenced.

Q. Can you find, without much trouble, the invoice for these 100 lamps in your invoice book—in February?

A. Feb. 1, 1888, 25 12-ft. lamps; Feb. 9, 25 12-ft. lamps; Feb. 10, 25 12-ft. lamps; Feb. 13 and Feb. 17th they are all 12-foot lamps. The 16-foot are all right. I am not clear whether we got
85 those in Feb. or January or March. As I say, we did not discover that the lamps were fraudulent until in June or July.

Q. Can you show us when you paid for this lot by any of your books?

A. I believe I paid all the bills promptly on the 10th of the month.

Q. Now, with reference to the matter of the burners, is it not a fact that before the solid metal burner was introduced that the Philadelphia company furnished to the Chicago com-any what is known as the tube burner?

A. I don't know that; we always got the tube burners.

Q. You never got anything but the tube burner until you got this lot from Philadelphia?

A. Yes, sir.

Q. Is it not a fact that since this the tube burner has been abandoned and they use only the solid metal burner?

A. I don't know of my own personal knowledge.

Q. Didn't you get from Philadelphia the tube——

A. Oh, I misunderstoos you; I thought you asked if they had not abandoned the tube burners. Oh, yes, they give us the tube burner.

Q. Don't you know that the parent company has abandoned the solid metal burner?

A. I don't know it of my own personal knowledge; I only know it from what I heard them testify to.

Q. Is it not a fact that since you commenced your dealings with

the Philadelphia Co. that you have been ordering from them some sort of liquid to whiten the lamps?

86 A. Yes, sir; white chyzal, a liquid solution; that is what I have been testifying about.

Q. Now, in regard to the lamps used in Middletown, did you ever sell any lamps in Hamilton or Dayton, or rent any?

A. No, I tried to.

Q. Is it not a fact that as soon as the Chicago company discovered that they sold nine lamps to Middletown that they turned the order over to you?

A. No, sir; they did not.

Q. It was turned over to you?

A. They sold three lamps in January and February and we protested.

Q. And they stopped?

A. No, sir; they immediately went on and sold nine lamps, and that is the reason that we could not do business in Middletown.

Q. But it seems that the Philadelphia Co. are able to do business with them?

A. Yes, sir.

Q. I will ask you to look at this letter upon the letter-head of the Cincinnati company, July 21, addressed to the Chicago company. Did your company send that letter?

A. Yes; that was sent by Mr. Ludlow.

Letter read to jury, said letter being "Exhibit X" in deposition of Joseph Wolf, hereto attached.

Q. You have filed a cross-petition in which you ask for $6,000 for their invading your territory at Middletown, Dayton, and Hamilton?

The COURT: You need not go into that.

Mr. KRAMER:

Q. You also claim, Mr. Eshelby, in your cross-petition,

87 $2,250.00 for excessive price of lamps sold you before the rendering of this last account?

A. Yes, sir.

Q. Have you any record or statement to show any such excessive prices?

A. I have no record beyond the fact that we obtained a price-list from the Philadelphia Co., and under our contract we were entitled to any reduction made, and from the fact that we did not receive the benefit of reductions——

Q. Can you tell of any reduction that the Philadelphia company made the Chicago company for which the Chicago Co. has not made a corresponding reduction to you?

A. I do not know of my own personal knowledge, except what I have seen——

Q. That applies to the fifty lamps and the two hundred and fifty. Do you know of any but that?

A. No, sir; of my own personal knowledge, I do not know of any at all.

Q. Upon what information, then, did you make this complaint—claim—in your cross-petition?

Question objected to by counsel for defendant. Question withdrawn.

Q. Mr. Eshelby, you have made up a list here of repairs amounting to $614.00 and wages paid to your boys and gas-fitter, in all about $1,200.00. You claim in your cross-petition $1,600.00; what is the balance for?

A. For the exchange of the bye-pass levers.

Q. You call that repairs?

A. The labor of taking them in and making the exchange;

88 yes, sir.

Q. Is it not a fact that you charge in that fifth charge $1,000.00 for bye-pass levers? Don't you remember?

A. Possibly.

Q. And then you also claim $1,000.00?

A. I don't know what you refer to.

Q. I refer you now to the letter of August 9th, written by you to the Chicago company: "Your statement furnished to us for $9,931 is not in accordance with the prices of your contract, which we respectfully refer you to. You charge us for 8 ft.," &c. Did you write that letter?

A. Yes, sir.

Q. Will you explain why you did not, in that letter, say that you had all these claims for damages; why the only thing mentioned is that the prices are wrong? Will you explain that to the jury?

A. As I say in a letter subsequent to this, we had looked into the matter and found——

Q. When you wrote this letter, Mr. Eshelby, of August 8th, were you aware of any of these claims that you had against the plaintiff?

A. Yes, sir; we had this claim.

Q. Why didn't you say something about it?

A. Why didn't I?

Q. That's what I say.

A. Because I didn't see fit to at that time.

Q. That is your answer? Because you didn't see fit to at that time?

89 A. Yes, sir.

Q. Why didn't you demand of them that they give you credit for selling the lamps in Middletown?

A. I had already told them about that.

Q. Why didn't you refer them to prices paid for repairs——

A. We were getting a good many things at this time, and, as I stated before, they said for us to go, and we would have a settlement later on.

Q. No—why didn't you name the repairs which you had made up to this time?

A. The same answer applies.

Q. And to the defective lamps also?
A. Yes, sir.
Q. And to the bye-pass levers?
A. What is the question? I do not know what you are asking me.
Q. In the lamps that you are using have you changed bye-pass levers?
A. Yes, sir.
Q. Then why didn't you object to that?
A. The same reason.
Q. Is it not a fact that the statement they afterwards rendered you and the statement that is sued on that they were $17.50—is it not true that they corrected that?
A. Yes, sir.
Q. Mr. Eshelby, why is it that in reply to this letter, when they asked you to state what your claims were, that you did not state your claims?
A. I did state them.
90 Q. Point out any letter in which you did state your claims.
A. I have one here; yes, here it is.
Q. I mean in addition to those two long letters of August, not as to your objection to paying these two drafts.
A. Well, I can tell you that I made up a statement when I looked into things. I don't see the letter; I thought it was here. It may be that it was my impression only that I wrote them a letter in regard to it; that was my impression, but it may be that it was a conversation that I had with Mr. Wolf. I can't find any such letter here.
Q. If you stated it verbally where and when was it, Mr. Eshelby?
A. That I cannot state positively. It may have been in his room at the hotel or it may have been at my office. I don't——
Q. In what month was it?
A. I should say in August—July or August—or possibly September.
Q. Well, what did you say to Mr. Wolf?

Adjourned to 2 o'clock, Feb. 10, 1890.

91 Met pursuant to adjournment.

Mr. ESHELBY on the stand.

Redirect examination.

Mr. DIENST:

Q. Mr. Eshelby, state the number of lamps which you had in use during the time or at the time that this stock of one hundred spurious lamps were sent you, and state the number that were in use at a period three months after that.
A. I can't state definitely without an examination of the books, because we were buying lamps right along, and we didn't but them

except as we needed them, and we bought quite a number; while as I stated that we got these lamps in February, we bought quite a number in the following months of March, April, and, I think, as late as May, and we put them up as soon as we got them.

Q. Can you state from your books what the amount would be? Have you your books here?

A. Yes, sir; we got—no, sir; nor from these books we have here; but we have an order book at the office.

Q. Then you cannot state what the decrease was?

Objected to by counsel for plaintiff, as the books will show and are the best evidence.

Objection sustained. Exception reserved.

Defendant rests.

Counsel for plaintiff move to strike from the record the testimony of Mr. G. N. Clapp, pres't of the Middletown gas works, with the exception of that part which refers to the 9 lamps.

92 Motion objected to by counsel for defendant.

Motion granted, and exception reserved by counsel for defendant.

Counsel for plaintiff moves to strike from the record all testimony in reference to the bye-pass levers.

Motion granted. Exception reserved by defendant.

Testimony in Rebuttal.

WILLIAM SMITH recalled by counsel for plaintiff.

Direct examination.

Mr. JACKSON:

Q. I will ask you to state, Mr. Smith, if this is one of the so-called spurious lamps.

A. It is; yes, sir.

Q. And this is one of the genuine lamps?

A. Yes, sir; it is.

Q. I wish you would show me where the cavity is that you say let in the air.

A. Yes, sir; this lamp is supposed to take in air in here (indicating), to supply this globe. The air must come into this globe. Well, here there is a leakage all around here in this lamp. The air in there gets in both ways and made the lamps smoke; it caused a draft. This lamp is made in one casting and does not let in the air, while this one is made in two castings and is then screwed

93 together. This other is in one casting and don't let in the air *in*. This one takes the air in here and lets it out here. To get these lamps to burn I have been stuffing them with asbestos and with plaster — Paris to make them burn; but you can't do it. The asbestos made a smell, and the people would complain of it.

Q. Where is the other casting?

A. Down here.

Q. And this is a separate casting?

A. Yes, sir.

Q. And this other is in one casting, you say?

A. Yes, sir. This is one put on here as a shell piece, to fit the lamp. I can take the lamps apart for you. This outside piece is the shell. There is the lamp. This lamp is made in one piece—one casting from here down to its base. The other lamp has that also. Now I will take the other lamp. Now, there's the two lamps. Of course this goes in.

Q. So far as you can tell from looking at these, say, they are just alike?

A. Just looking at them? Yes, sir.

Q. But you say this is a separate casting and let the air in there?

A. Yes, sir.

Q. This lamp that you have here is one that has been recently purchased from Philadelphia?

A. I could not tell you that.

Q. It is not as old as the other one?

A. Oh, yes, sir, it is; it has been cleaned up several times.

94 Q. It is a fact, Mr. Smith, that the best of your lamps give through from smoking?

A. No, sir, only when they had the bad burner on.

Q. Then how does it happen that you have been obliged to whiten the lamps?

A. Oh, this stuff that we put on here naturally burns off, burns this away, and will turn brown; and you naturally can't go into a man's house and scrape that off. We put this on to whiten it.

Q. What are chyzal and asbestos used for?

A. That is chyzal used here on this sample. There is a liquid form of chyzal and there is a dry form.

Q. What is asbestos used for?

A. It is like tar. It is some stuff that we bought to fill up, but it stunk so bad we couldn't use it.

Q. The only difference, Mr. Smith, that you are able to state to the jury, between the spurious lamps and the genuine lamps is this passage through which the air was let in?

A. That is all, sir. Of course the lamps are a little different in the made-up, but the trouble was in the leakage.

And the foregoing is all the evidence given or offered by either side upon the trial of said cause.

And the court then charged the jury as follows:

95 United States District Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN CO., Plaintiff,
—
THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO., Defendant. } = 4226.

Charge to the Jury.

SAGE, *J.*, orally.

GENTLEMEN OF THE JURY: It must have been a pleasure to you, as it has been to the court, to listen to the trial of a case conducted with perfect propriety and fairness and mutual consideration by counsel for each other and for the witnesses.

It now remains for me to state to you the rules of law which are to guide you in determining the issues between the parties.

The plaintiff sues upon an account (a copy of which is attached to the petition) to recover the sum of six thousand nine hundred and twenty-two dollars and sixty-four cents ($6,922.64), with interest from August 8, 1888, for goods and merchandise sold and delivered to the defendant. I do not understand that there is any dispute concerning the items of this account as to the sale and the delivery. The defendant rests solely upon certain propositions which are stated in the answer, and which have been testified concerning by witnesses whose depositions have been read and by wit-
96 nesses who have been on the stand.

The first defense in the answer need not be considered by you.

The second defense is that the defendant has not received the benefit of reduction in price made by the Philadelphia Co., which is referred to as "parent company," being the patentee of the gas lamp which has been referred to in the testimony of the Chicago company, the plaintiff in this case, the contract providing that for any reduction made by the parent company to the Chicago company in the price of lamps furnished by it there should be a corresponding reduction in prices charged by the Chicago company to the Cincinnati company.

Now, I do not understand that there is any substantial difference—or any difference at all—between the parties as to the fact that there was a reduction made by the Philadelphia company to the Chicago company, and that the Cincinnati Co. did not receive the benefit of it. At all events, I understand it to be conceded that the amount claimed by the Cincinnati company may be deducted—that is to say, that you will subtract from the amount claimed in the petition, $6,922.64, the sum of $383.75; so that, so far as this defense is concerned, you will deduct that sum, $383.75, as of the date of the account.

The second defense (that is, the third one as numbered in the answer, but the second that you are to consider) is that, whereas
97 the contract provides that the defendant should have the exclusive sale of the lamps specified in the counties of Hamil-

ton, Butler, and Montgomery, the plaintiff sold lamps at Middletown, Butler county, and thereby violated that condition of the contract.

Now, it appears, and I think the testimony is not disputed upon this point, that the Chicago company did sell outright to parties in Middletown 9 lamps, and subsequently quite a number more were sold and delivered to parties in Middletown by the parent company. Of that I will speak presently, but now I confine myself to the 9 lamps sold by the Chicago Co. to parties at Middletown.

Upon attention being called to this sale the Chicago company notified the defendant, the Cincinnati company, of its willingness to pay a sum stated in evidence, of which I have not a memorandum, but it was their profit of $4.80 per lamp. That was not accepted by the Cincinnati company, which claimed that it was entitled upon those 9 lamps to the amount which it would have made if it had furnished them upon its own terms, which were either a rental at the rate of $12.00 per annum per lamp or a price for a sale outright of $35.00 after the first year's rental.

Now, gentlemen, as the case was in progress I ruled out that testimony as furnishing a measure of damages for the reason that the law regards damages in matters of this sort as compensatory merely, and therefore awards what will make the party complaining whole by the rule that the damage shall be that which it incurred as a natural and proximate result of the wrongful act.

98 The law does not permit the recovery of speculative damages as profits which a party estimates or supposes he might have made if he himself had conducted the transaction. It permits a recovery of profits as such only when they are so certain as to be relieved from the objection that they are speculative or uncertain, and the difficulty of the claim under consideration on the part of the defendant is right here: that it by no means follows that the Middletown parties, who were willing to pay to the Chicago Co. $4.00 for each lamp, would have been willing, had they not obtained the lamps from the Chicago company, to pay to the Cincinnati company a rent of $12.00 for the first year and then $35.00 for the lamp. Indeed, it appeared by the testimony of Mr. Eshelby that negotiations were pending with these parties in Middletown, and that they were not willing to pay the price asked by the Cincinnati Co. Therefore, in consideration of the rule of law which I have stated to you, and which has been confirmed by the Supreme Court of the United States, the defendant's claim in this regard as to the amount of damages was ruled out; but the defendant is entitled to recover proper and legitimate damages for the sale of those nine lamps at Middletown; and I have to say to you that the only legitimate damage & the only damage that you can consider in that regard is the profit which the Chicago Co. actually made upon the sale of each one of those lamps, which, I think, according to the testimony, is conceded to be $4.83 per lamp.

Counsel advise me that the only evidence as to that is that the profit was from $4.00 to $5.00. It is for you to ascertain what is the true amount. The testimony is in the depositions altogether, and you may take them and examine them for yourselves.

99 If you find the amount accurately given, you may render a verdict upon that point according to the amount so found; if not, if the testimony is that the profit was from $4.00 to $5.00, then the safe mode is to say $4.00. I thought it was stated that the amount was $4.83.

(Defendant excepted to so much of said charge as assumed the damages to be speculative and limited the recovery to the difference between the amount the defendant was obliged to pay for the lamps to plaintiff and the plaintiff actually received from the Middletown company.)

Now, it was also claimed that inasmuch as the parent company had sold a lot more of lamps at Middletown, that the defendant was entitled to damages upon those lamps; but the court is of opinion that they cannot be considered, because the only provision of the contract upon which that claim rests is the provision giving to the defendant an exclusive right, or agreeing to sell exclusively to the defendant, for sale in the counties above named, all burners, fixtures, and appliances made by the said Siemens-Lungren Company, and that the plaintiff would not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned, or controlled by said Siemens-Lungren Company; would, upon the contrary, to the best of its ability, prevent the sale of any such articles for use within the territory named to any other than defendant, its successors or assigns.

If there were any testimony to show that the Chicago company had knowingly permitted the Philadelphia company to sell lamps within this territory, then the Chicago company would be 160 liable; but there is no such testimony. It is not claimed on behalf of the defendant that any notice was served upon the Chicago company by it of the sale of those lamps within the territory covered by this contract.

(Defendant excepts to so much of the charge as excludes from the jury consideration (defendant's) claim for damages on account of sales of lamps by the parent company (of Philadelphia) in Middletown and requiring evidence of notice of such sales to the Chicago company.)

The next defense rests upon the clause of the contract relating to repairs, and that clause is as follows: "That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five (5) years, exclusive of any globes broken or other damages done through careless handling, and that it will defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named; and that upon the expiration of said period of five years they will, if the parties of the second part so desire, guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid the additional sum of three (3) dollars for each lamp thus guaranteed."

Now, it appears from the evidence that during the existence of this contract the Cincinnati company was compelled to incur the expense of certain flame plates and other articles which it was

necessary to replace in order that the lamps should continue to render good service. Well, now, gentlemen, if you find from the evidence, as it seems to me you must, or at least that
101 you would be warranted in doing, although I leave it entirely to you, that these were repairs, then the proper cost of them is chargeable to the plaintiff and is to be deducted. There is also testimony with reference to the cost of a certain application which was made for whitening a portion of the lamp which comes in contact with the flame. You have heard that testimony. It is said on the one side that that is a repair; on the other side that it is not a repair, but is analogous to cleaning the lamps, and cleaning is certainly not a repair, and that therefore it ought not to be allowed. It is for you to pass upon that matter. If you find that those were repairs, then the cost of them is chargeable as a credit to the defendant; otherwise not. Of course, if this item is allowed in it is to be *to be* included the expense of making the repairs—not merely the price of the flame plates and other articles enumerated, but the fair and necessary cost of making the repairs.

In passing on that question, so far as you find that there is any dispute in the testimony, it is proper for you to refer to any and all circumstances which may enable you to determine the weight and accuracy of the evidence. The plaintiff says no account was ever rendered of these repairs—these alleged repairs; no charges were made upon the books; no objection or claim was made by the defendants until after this difficulty arose, and therefore they did not understand that these were items for which the plaintiff was responsible; that it is evident that the defendant didn't intend to make any charge for them and that they were understood and recognized by both parties as incidental matters which would grow naturally from the use of the lamps and not included in the term "repair."

102 Well, on the other hand, the defendant, by its president, says that at the time these expenses were incurred and paid he was occupied in other matters and didn't pay attention to the condition of the contract, so as to fully appreciate the rights to which the defendant was entitled under it, but that as soon as his attention was called to it he did notify the plaintiff, and the letter is read in evidence.

Well, gentlemen, these are considerations *pro* and *con.* exclusively for your consideration, or for your attention, rather, and I leave the whole matter to you for your decision.

(And the court being requested by the defendant to charge in this connection that the jury should take into consideration the probable repairs to said lamps for the balance of the period of five years, as guaranteed by said contract, the court refused to so charge; to which refusal defendant excepted.)

The next defense is that a lot of one hundred lamps was furnished by the plaintiff company to the defendant as under this contract, which lamps were not in fact made by the parent company—that is to say, by the Philadelphia company—but for which the defendants paid, including freight and incidental expenses of the purchase,

$2,000.00; that these lamps, they were notified by the Philadelphia Co., were an infringement of its patent and to retire—that is, to withdraw—them from sale or use, and that when they undertook to use them they found that there was a leakage resulting from their construction. As you have learned from the witnesses, the flame is enclosed within a glass globe, so constructed and attached that the air is admitted at only one point and in such a way as to
103 cause a draft and as nearly perfect combustion as may be and thereby insure greater brilliancy of light. The difficulty with these one hundred lamps was that while the external construction was not visibly different from that of the Philadelphia lamps, a part which in the Philadelphia lamp was cast or made solid was in the one hundred lamps made in two pieces, which were screwed together and so constructed that the air found ingress at another than the regular place, whereby the current was broken and disastrous results as to the flame or operation of the lamp followed, and that the complaint against this lamp was general on the part of all who received it, so that it had to be taken out.

Now, the defendant claims that it ought to be credited with the price which it has paid for these one hundred lamps; but the plaintiff says, "In the first place, according to your own testimony, you sold 12 of those lamps at $35.00 apiece, which would be in the aggregate $420.00, and you are not entitled to that." Well, that is very true, gentlemen. The defendant further claims that there was no infringement in those lamps, because the parts were constructed by the Philadelphia company (the parent company) and sold by it and sent by it to the Chicago Co. for use, and therefore they come within the license from the parent company to the Chicago company.

Now, if these are the facts, the conclusion is right. They could not sell those lamps in what is called the "knock-down" form (precisely what that term means we have not been advised) to the Chicago Co. for use and sale without thereby authorizing the Chicago company to put them together in the proper shape for sale and for use, so that if you find that that is the state of facts, that those 100 lamps are the lamps sold and furnished by the Philadel-
104 phia company, that is an end of the question of infringement, so far as they are concerned; and then the plaintiff says, "Why, you didn't make any complaint of those one hundred lamps at the time, and it is not credible, if they were so utterly unfit and unsatisfactory, that you would have been silent from February until June and then made no complaint of the operation of the lamp, but ordered more lamps for use at the exposition;" and so the plaintiff says that these facts are not consistent with the defendant's present claim, but go in support of the plaintiff's proposition that the defense is what is termed sometimes in law "trumped up"—that is to say, it is an afterthought for the purpose of defeating the recovery by the plaintiff and not made in good faith.

Now, in reference to the damages upon these lamps I have to say this to you: If they were defective, as the defendant claims, the defendant upon discovering the defect had *his* choice of two remedies; it could throw and be relieves from payment for them; that it did

not do; or it could keep them and then it would be bound to pay the actual value for them. It is just exactly as if one of you gentlemen, being a farmer, should buy a horse as a sound horse—represented to be sound—and you should find when you came to try him that he was spavined or had splints, or this or that or the other defect which you did not see when you bought him. Now, you could do one of two things: take that horse back to the person from whom you bought him and cancel the trade, or you could keep him and pay for him what he is worth. But you cannot keep the horse and not pay anything; that won't do. If you keep him you have to pay his real value. In other words, the rule of
105 damages in such a *such a* case is measured by the difference between the contract price and the actual value of the thing delivered.

Now, the defendant, as to the 100 lamps, kept them. I do not remember, gentlemen, that there is any evidence before you as to what their actual value was. So far as my recollection serves me, the testimony is silent on that point; yet, the defendant keeping those lamps, that would be the only measure of damages that *he* would be entitled to.

Upon the other hand, it appears that the defendant did sell 12 of those lamps at $35.00 apiece, and the purchaser still has them. So that, if I am correct in my statement of the testimony, I cannot see that you can do anything more than award nominal damages—that is to say, in the aggregate from $1.00 to $5.00.

Defendant excepts to so much of the above charge as limits its recovery of damages upon the 100 lamps sold to it by the Chicago company to nominal damages.

There was another claim made or sought to be made by the defendant with reference to these lamps—that it interfered with their business and injured it, and that defendant's trade after that was less than before. That claim was ruled out because the law does not permit anything of that sort. It is too uncertain, and therefore the only measure of damages is that which I have stated.

The next defense related to the bye-pass levers, but it has been withdrawn, and need not be considered.

The last defense is that the lot of two hundred and fifty lamps was furnished with solid metal burners instead of with tube burners. The tube burners were of an earlier date and the solid metal burners later and supposed to be an improvement, and,
106 as I *I* understand it, conceded to have been furnished in good faith as an improvement, whereas, in fact, they were not so good as the tube burner, and the lamps did not operate so well with them.

Now, the difficulty with that claim is that there is no evidence as to the loss in value—that is to say, no evidence indicating how much less valuable the lamps were by reason of this change. There is evidence that it would cost about $3.00 per burner to make the change, but that expense has not been incurred by the defendant. They have not made the change; and, as was stated during the

progress of the trial, when the matter was spoken of in reference to the testimony, they cannot recover damage which they have not sustained; otherwise they might take the $3.00 from the plaintiff and put it into their pockets and not make the change at all. Moreover, there is testimony that the Philadelphia company has offered to replace the solid metal burners with the tube burners upon application. I think the testimony shows that at one time at least it certainly did so, as claimed by the defendant. The Philadelphia Co. refused to make that exchange because the Chicago Co. had not paid to the parent company some bill that was owing. But, as I understand it from the testimony, and it is conceded by counsel, a settlement has been arrived at between those companies, and the suit for infringement has been withdrawn and also another suit which the Philadelphia company had instituted against the Chicago company, and all matters of difference between the two companies have been settled, so that there is now no difficulty between them, and no objection on the part of the Philadelphia company to exchanging the burners upon application.

Well, now, gentlemen, if that be the case the damages would
107 be *the damages would be* only the actual expense of making that shown by testimony, so there can only be nominal damages upon this claim. In this, gentlemen, as in every other case, the findings of the jury must be upon the evidence of the case; and upon all of these matters that I have referred to as matters of evidence I have to say to you that they are matters of affirmative defense in the nature of counter-claims, and therefore the burden of proof is upon the defendant to satisfy you by a preponderance of evidence—that is, by evidence that makes the stronger impression upon your minds—that its claims are well founded.

(Defendant excepts to so much of said charge as prevented the jury from considering the items of $3.00 per burner for each of the 250 lamps purchased by defendant from the plaintiff, being the amount claimed to be necessary — be expended in order to make said lamps serviceable, and to so much thereof as limited the amount of recovery of said burners to nominal damages.)

Gentlemen, you need not calculate the interest upon whatever balance you find, but you can state the amount in your verdict, and add "with interest from August 8, 1888, until February 4th, 1890, being the first day of this term of court," and the computation can be made later.

Whereupon the jury retired for deliberation, and returned a verdict for plaintiff, as appears of record in this case; and the defendant within three days thereof filed a motion to set aside verdict and
for a new trial, for the reasons therein stated, and the same
108 was argued by counsel and submitted to the court, which, upon consideration, overruled the same and entered judgment upon said verdict, as also appears of record.

Defendant thereupon excepted to the overruling of said motion and presents to the court its bill of exceptions in this case, and prays

that the same may be allowed, signed, sealed, and made part of the record herein, which is accordingly done.

In testimony whereof the judge of the said United States circuit — has hereunto set his hand and seal and the seal of said court to this bill of exceptions this 1st day of April, A. D. 1890.

[SEAL.] GEORGE R. SAGE,

United States District Judge in and for the Southern District of Ohio, Sitting in and Holding the Circuit Court in and for said District upon the Trial of the Above-Entitled Action, the Hon. Howell E. Jackson, Circuit Judge, Being Absent from the District.

109 United States Circuit Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN CO.
vs.
THE CINCINNATI SIEMENS-LUNGREN CO. } No. 4226.

THE STATE OF ILLINOIS, }
County of Cook, } *ss:*

I, William K. Lowrey, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Leopold J. Wolf and Joseph Wolf were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them was subscribed as above set forth were reduced to writing by —— Ray, a stenographer and a disinterested person, in my presence and in the presence of the several witnesses aforesaid. I further certify that counse- for both parties agreed that said depositions should be so reduced to writing by the said —— Ray, as appears in said depositions.

I further certify that said depositions were subscribed by the said witnesses respectively in my presence and were continued from day to day as above set forth, and that said depositions were taken at the time and place specified in the notice hereto attached,
110 and that I am not counsel, attorney, or relative of either party nor otherwise interested in the event of said suit.

I further certify that the said witnesses and each of them live more than 100 miles from the place of trial.

In testimony whereof I have hereunto set my hand and official seal this — day of October, 1889.

—— — .

111 STATE OF OHIO, *Hamilton County,* } ss:

THE WESTERN SIEMENS-LUNGREN CO., Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGREN COMPANY, Defendant.

Case No. 4226, pending in the U. S. circuit court, southern district of Ohio, western division.

The above-named defendant will take notice that on Friday, the 27th day of September, 1889, the plaintiff above named will take the depositions of Joseph Wolf and sundry witnesses to be used as evidence in the trial of the above cause at the law office of William K. Lowrey, No. 95 Dearborn street, city of Chicago, in the county of Cook and State of Illinois, between the hours of 8 o'clo- a. m. and 6 o'clock p. m. of said day, and that the taking of the said depositions will be adjourned from day to day, between the same hours, until they are completed.

KRAMER & KRAMER,
Attorneys for Plaintiff.

Counsel for respective parties agree that the giving of the names of the several witnesses to be examined in the above case, at the said time and place, is hereby waived, and said counsel consent that the depositions of such witnesses as may be produced at said time and place may be taken.

And it is further agreed by said counsel that these depositions may be taken before a disinterested stenographer and reduced
112 to writing by him and signed by the several witnesses after the same have been so reduced to writing, and all exceptions or objections to the said depositions by reason of the failure to specify the names of each witness in this notice, and also by reason of the same being taken and reduced to writing by said stenographer, are hereby expressly waived.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is by agreement waived; also all exceptions as to time.

Done this 23rd day of September, A. D. 1889.

EDWARD DIENST,
Att'y for Defendant.
KRAMER AND KRAMER,
Attorney- for Plaintiff.

113 United States Circuit Court, Southern District of Ohio, Western Division.

THE WESTERN SIEMENS-LUNGREN COMPANY } No. 4226.
vs.
THE CINCINNATI SIEMENS-LUNGREN CO.

THE STATE OF ILLINOIS, } ss:
County of Cook,

I, William K. Lowrey, a notary public in and for the county and State above named, duly commissioned and qualified, do hereby certify that the above-named Leopold J. Wolf and Joseph Wolf were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them subscribed as above set forth were reduced to writing by Catherine H. Rea, a stenographer and a disinterested person, in my presence and in the presence of the several witnesses aforesaid. I further certify that counsel for both parties agreed that said depositions should be so reduced to writing by the said Catherine H. Rea, as appears in said depositions.

I further certify that said depositions were subscribed by the said witnesses respectively in my presence and were continued from day to day as above set forth, and that said depositions were taken at the time and place specified in the notice hereto attached, and that I am not counsel, attorney, or relative of either party
114 nor otherwise interested in the event of said suit. I further certify that the said witnesses and each of them live more than one hundred miles from the place of trial.

In testimony whereof I have hereunto set my hand and official seal this 12th day of October, 1889.

WILLIAM K. LOWREY, [SEAL.]
Notary Public in and for Cook County, State of Illinois.

Depositions of sundry witnesses taken in case No. 4226, pending in the United States circuit court, southern district of Ohio, west. division, before me, William K. Lowrey, a notary public in and for the county of Cook and State of Illinois, pursuant to the notice and agreement between counsel of record for the parties to said cause hereto attached, and at the time and place in said notice and agreement specified, The Western Siemens-Lungren Co. being the plaintiff in said cause and The Cincinnati Siemens-Lungren Gas Illuminating Company being the defendant, Lowrey Jackson being present on behalf of the plaintiff and Edward Dienst appearing on behalf of the defendant.

115 LEOPOLD J. WOLF, being first duly cautioned and sworn, deposes as follows:

Q. State your name, age, residence, and occupation.

A. Leopold J. Wolfe; age, 33; residence, Chicago; occupation, fur business.

Q. State what was your occupation in June and July, 1888.

A. I was in the fur business and in the gas-light business.

Q. You may state what your connection was with the plaintiff company at that time.

A. I was president of the company.

Q. How long had you been president of the company?

A. I was elected president for the plaintiff company the 24th day of May, 1888.

Q. When did you cease to be president of that company?

A. On Dec. 10, 1888.

Q. I will ask you, Mr. Wolf, to look at this paper and identify the same and state what it is.

A. The paper shown me is a certified copy of the articles of incorporation of the plaintiff company.

Counsel for plaintiff offers the said certified copy of the articles of incorporation in evidence, and the same is handed to the notary and marked by him Exhibit "A" and made a part of this deposition.

Q. What connection, if any, did you have with the Siemens-Lungren Gas Illuminating Co.?

116 A. I was secretary and treasurer.

Q. State how long you had been secretary and treasurer of the Siemens-Lungren Gas Illuminating Co. at the time of the organization of the Western Siemens-Lungren Co.

A. For about a year and a half.

Q. About when did the Siemens-Lungren Gas Illuminating Co. cease to do active business?

A. Practically about April, 1888; somewhere either about March or April, 1888.

Q. You may state what, if any, business transactions were had between the Western Siemens-Lungren Co. and the Siemens-Lungren Gas Illuminating Co. with reference to the purchase of the assets of the latter company by the former.

A. The Western Siemens-Lungren Co. purchased the assets, consisting of merchandise and capital stock, in the Chicago Gas Light Illuminating Company, and contracts that had been in force with subcompanies for the sum of $12,000, I believe.

Q. I will ask you to look at the book now shown you and state what it is.

A. Minute book of the Western Siemens-Lungren Company.

Q. I will call your attention to page 10 of said book and ask you to state what, if any, proposition appears thereon.

A. There appears on page 10 of said book a proposition from the Siemens-Lungren Gas Illuminating Co. for the sale of all their assets and contracts, as specified in my former answer to the Western Siemens-Lungren Co.

117 Q. Do you know in whose handwriting the said proposition in said minute book is kept, and do you know the signature found on page 11 of said book.

A. I do.

Q. State in whose handwriting they are.

A. The proposition is written by Mr. Louis Powell, who was at that time president of the company. The signature is that of Adolph Wolf, who was at that time secretary of the company.

Q. I call your attention to pages 12 and 13 of said minute book and ask you to state generally what appears thereon.

A. On pages 12 and 13 appears the acceptance of a proposition made to the Western Siemens-Lungren Company by the Siemens-Lungren Gas Illuminating Co.

Q. State if you know in whose handwriting the said pages 12 and 13 are kept.

A. The writing, excepting the signature, is in the hand of Louis Powell. The signature is that of Adolph Wolf.

Counsel for plaintiff offers pages 10, 11, 12, and 13 of the said minute book in evidence, and the said book is handed to the notary and said pages marked Exhibit "B," "C," "D," and "E," and the same are made a part of this deposition. It is consented by counsel for both parties that the stenographer may make a verbatim copy of the said four pages, which shall have the same force and effect as if the said four pages were introduced in evidence.

Q. You may state whether after the organization of the plaintiff company it proceeded to engage in business in this city and State.

A. Immediately.

Q. And you may state how long it has so continued in business.

118 A. It is still in business.

Q. Please examine the paper now shown you and state what it is.

A. The contract between the Siemens-Lungren Co. of Philadelphia and myself for the sale on my part of their goods in the State of Ohio, certain counties excepted, Indiana, Illinois, Wisconsin, Missouri, Michigan, Iowa, and Minnesota, dated 6th day of April, 1888.

Counsel for plaintiff offers said contract in evidence, and the same is handed to the notary and marked Exhibit "F" and made a part of this deposition.

Q. Please examine the paper now handed to you and state what it is.

A. This is an assignment by me of my contract with the Siemens-Lungren Co. of Philadelphia to the Western Siemens-Lungren Co. of Chicago, dated the 28th day of June, 1888.

Counsel for plaintiff offers said contract in evidence, and the same is handed to the notary, marked Exhibit "G," and made a part of this deposition.

Q. Please examine the paper now shown you and state what it is.

A. This is a contract between the Siemens-Lungren Co. of Phila-

delphia and the Western Siemens-Lungren Company of Chicago, agreeing that the Siemens-Lungren Company of Philadelphia would be responsible for all the contract rights belonging to the subcompanies of the Siemens-Lungren Gas Illuminating Co., dated June 28th, 1888.

119 Counsel for plaintiff offers said contract in evidence, and the same is handed to the notary and marked by him Exhibit "H" and made a part of this deposition.

Counsel for the defendant objects to the introduction of the contract in question.

Objection withdrawn.

Q. I will ask you to examine the account annexed to and filed with the petition in this case and state whether or not the same is correct.

A. It is correct.

Q. I will ask you to state if the goods specified in said account were delivered to the defendant.

A. They were delivered to the express office, marked for the defendant.

Q. Has the said account or any part thereof been paid?

A. No.

Q. You may state whether the prices charged for merchandize in said account were in accordance with the contract between the Western Siemens-Lungren Co. and the Cincinnati Siemens-Lungren Gas Illuminating Co.

A. The said prices are in accordance with the contract between the Siemens-Lungren Gas Illuminating Co. and the Cincinnati Siemens-Lungren Gas Illuminating Co., which contract was purchased by the Western Siemens-Lungren Co., as appears in my previous answers.

Q. You may state fully whether any reduction in price was made either to the Siemens-Lungren Gas Illuminating Co.
120 or the Western Siemens-Lungren Co. by the Siemens-Lungren Co. of Philadelphia; and, if so, state the consideration of said reduction and how the same came to be made.

A. There was a reduction made that would appear on the surface to cheapen the lamp, but in reality it did not cheapen it any or but a little. When the goods were shipped us under the first price the lamps were sent put together, the different parts adjusted, and the lamp was nickeled. In sending them put together it made a bulky package and, in consequence, increased the freight rate and the liability to breakage, so that, in consultation between the Eastern and Western people interested, it was concluded that the lamps should be shipped from the East in what was called knock-down form, thereby enabling them to pack one hundred of each article compactly in a box, and the Western company thereupon fitted up a shop to put the lamps together and to do the little filing and adjusting necessary to ship the lamps as plain iron instead of nickeling them East, the Western people believing that they could be better nickeled in Chicago. In consideration of the fact that the

Philadelphia company was relieved from the expense of adjusting the various parts and constructing the lamp and of the expense of nickeling the lamp this reduction was made.

Q. State whether any other reduction was ever made by the Siemens-Lungren Company of Philadelphia either to the Siemens-Lungren Co. of Philadelphia, either to the Siemens-Lungren Gas Illuminating Co. or to the Western Siemens-Lungren Co.

121 A. No; no other reduction.

Q. State what, if any, lamps were sold by either the Siemens-Lungren Gas Illuminating Company or the Western Siemens-Lungren Co. during your connection with said companies in any territory belonging to the defendant, and state fully how it came that said lamps were sold in said territory, if they were.

A. There were no lamps sold by either company excepting nine lamps that were sent to Middletown, Ohio, to the Middletown Gas Co. We received several orders from them for small quantities of lamps and took it for granted that the Cincinnati Co. would have no objections to our sending them nor any further interest in our sending them than to get their share of the profit.

Upon shipping the lamps to Middletown, we notified the Cincinnati Co. that the goods had been shipped and the proper difference between the price to the Middletown Gas Co. and the price to the Cincinnati Co. had been credited to the Cincinnati Co. The Cincinnati Co. finally notified us that they would prefer that we did not send any more lamps to Middletown, and we then notified the Middletown Gas Co., upon receipt of subsequent orders, that the Cincinnati Co. objected to our sending any goods to them from Chicago, and that they would have to apply to the Cincinnati Company for any lamps they would want. In answer to our letters to the Cincinnati Co., in which we stated that we had credited the difference in price to their account, they wrote that they would leave that matter to be adjusted at some future time, and in their settlement for merchandize subsequently with us they took no

122 recognition of the credit we had given them for their share of the profit.

Q. How much was the profit upon the said 9 lamps shipped to Middletown?

A. I do not remember exactly, but I should say, from memory, that it was something like $4 apiece, possibly $5, but I am not sure.

Q. Did either of your companies ever sell any lamps to Dayton or Hamilton, during the continuance of your contract with the Cincinati Co.?

A. Not one.

Q. Please state what, if any, demand was ever made upon either of the Chicago companies for moneys to be used in the incidental repairs of lamps which had been furnished to the Cincinnati Co. prior to the filing of the answer herein.

A. No communication of any nature.

Q. You may state any conversations that you may have had with the Cincinnati company or with Mr. Eshelby, the president of the

same, after the date of your contract with said company, with regard to repairs upon the lamps.

A. Some time in the latter part of August or the first part of September I was in Mr. Eshelby's office, and I asked him the reason why our bill was not paid. He told me that he could not tell me definitely; that he would have to call a meeting of the stockholders or directors of the company, and they would then inform the company by mail unless I preferred remaining for several days until he could call a meeting. He said that he could tell me this much: that there were charges for repairs on the lamps and for other matters. I answered that of course I could not argue against any claims that he did not state to me, but so far as any claims for repairs were concerned I could not see how he could have been put to any expense in repairing them nor how he could have repaired them, if they needed it, because he would have been compelled to get the material from us or from the Philadelphia Co., those being the only two sources of supply, and, having no right to purchase from the Philadelphia Co., he naturally would have been compelled to apply to us, and that we had had no orders from him for any materials necessary to repair the lamps.

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Q. Is it necessary, in conducting the business which the Cincinnati Co. was then conducting, to send a man at stated periods for the purpose of repairing the lamps?

A. It is not. It is necessary to send a man periodically to clean the globes and to shake off any sediment or carbon caused by the combustion of the gas that may have settled either in the governor or the burner in order to preserve the proper shape of the flame, and the lamp is so constructed purposely that the governor and the *the* burner may be removed from the lamp without otherwise disturbing the lamp, so that this very purpose can be accomplished. It is understood by all companies or persons who operate the lamps that it is necessary periodically to so clean them in the same sense that it is necessary to trim the wick of an oil lamp to have it burn properly or to put a carbon in an electric lamp to produce light.

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Q. You may state whether either of the Chicago companies at any time shipped to the Cincinnati company lamps which were an infringement upon the Philadelphia patents or lamps manufactured in whole or in part in Chicago; and, if so, state fully the circumstances.

A. Neither did. The Siemens-Lungren Gas Illuminating Co. manufactured some lamps in Chicago, which under its contract it had a right to do under certain conditions which existed. Upon attempting to put the Chicago manufactured lamps into use in Chicago it was discovered that those portions of the lamps which had been patented were not properly constructed or possibly were made of the wrong material. These parts consisted of the burners, the flame plate, and the governor, the three essential parts of the lamp. This left only the mere shell of the lamp as being made in Chicago, consisting of the gas pipe, a piece of iron casting, the regere-at*a*tive chamber, and the tin chimney stack. In consequence all govern-

ors, burners, and flame plates manufactured in Chicago were discarded and destroyed, and these parts necessary to make a perfect lamp were supplied to us by the Philadelphia company and made a part of the Chicago-made lamps. When the merchandise and contracts were sold to the Western Siemens-Lungren Co. by the Siemens-Lungren Gas Illuminating Co. a portion of the stock on hand, consisting of these lamps, and some of them to the number of 92, were sent to Cincinnati.

To all that portion of the foregoing answer which is the witness' construction of the contract in question counsel for defendant objects. Objection sustained.

125 Q. State whether the Cincinnati Co. ever returned or tendered back to the Chicago companies any of the said 92 lamps so shipped to them.

A. It did not.

Q. State whether the said lamps, partially made in Chicago and partially in Philadelphia, as you have stated, were serviceable lamps for mercantile purposes, or otherwise.

Objected to by counsel for defendant.

A. They were. Of that I am positive for this reason: No lamp made as described in my answer to the previous question was ever sent without first being tested by us.

Q. You may state what character of lamps your companies in Chicago delivered to the Cincinnati Co. with reference to their being or not being of the most approved pattern manufactured at the date of shipment.

A. We always shipped the most approved patterns, necessarily so because we carried no large stock in Chicago, simply keeping supplied for a few days in advance, and as our stock became exhausted ordering new from Philadelphia.

Q. State fully the circumstances relating to the supplying of a bye-pass lever to the Cincinnati Co. in exchange for the old-style levers previously used by them.

A. The Philadelphia company got up a new-style bye-pass lever, and as soon as we were informed of it we requested them to supply us with it. They sent them to us in such quantities, they claimed, and as rapidly as they could manufacture them
126 *them*, and we offered to the Cincinnati Co. to give them the new-style bye-pass levers in exchange for the old-style bye-pass levers as rapidly as we could be supplied from the factory.

Q. You may state if any charge was made by your companies against the Cincinnati Co. for the furnishing of the improved levers.

A. None.

Q. You may state what expense, if any, would ensue in making the change from the old-style levers to the improved levers.

A. One gas-fitter, with his helper, ought to be able to change the bye-passes, substituting the new style for the old, on at least fifty lamps per day.

Q. You may state if at any time any demand was made upon

you or the companies you represented for expenses incurred by the Cincinnati Co. in making said change.

A. No.

Q. You may state whether at any time the Siemens-Lungren Gas Illuminating Co. or the Western Siemens-Lungren Co. failed, for more than 30 days, to ship and deliver goods ordered by the Cincinnati Co.

A. We have always filled and delivered to the railroad company all orders received from the Cincinnati Co. before the expiration of 30 days from the receipt of the order.

Q. Please examine the paper now shown you and identify the same.

A. This is an agreement, made between the Siemens-Lungren Co. of Philadelphia and Joseph Wolf, giving to the latter the right to sell the goods manufactured by the former in the State of
127 Ohio, excepting the counties of Mahoning, Columbiana, Jefferson, and Belmont, and by him assigned to the Siemens-Lungrene Gas Illuminating Company.

Q. Please state if you know the signature- to said contract: and, if so, whose they are.

A. I am acquainted with the signatures on the contract, and I know the one to be E. Stein, president of the Siemens Lungren Co. of Philadelphia; the other of H. A. Brognard, secretary of the same company; and third, Joseph Wolf, president of the Siemens-Lungren Gas Illuminating Co.

Counsel for plaintiff offers said contract in evidence, and the same is handed to the notary and by him marked Exhibit "I" an- made a part of this deposition.

Q. State if at any time said contract, to your knowledge, was shown to and examined by the Cincinnati Co. or its officers.

A. In arranging with the persons comprising the Cincinnati Co. they desired to see the contract under which we held the right to Ohio or to the territory that we proposed to sell them, and I handed them this contract for examination and their perusal. There were a number of gentlemen in Mr. Hickenlooper's office, at the gas office, at the time; among them I remember Gen. Hickenlooper, Mr. Eshelby, Mr. Billingheimer, Mr. Gray, and Mr. Fleischmann. As to that, I would not be positive that all of those gentlemen were there when I handed the contract for examination. I handed it to Gen. Hickenlooper, and it is my impression that the gentlemen were there at that time and discussed it with him, but I would not be positive. Some of them were there and some of them kept
128 coming and going, and it *and going and it* may be that at one time and another they all had a chance to talk it over, but whether they all examined it I do not know. Some of them were in the office and some of them remained until the close of the negotiations, but whether all these people were there and looked over the contract I do not know, but they had an opportunity because it was in Gen. Hickenlooper's possession. Those who looked it over and those who he selected to discuss it I do not know.

Cross-examination:

Q. Mr. Wolf, I will ask you to examine this copy—of course you are familiar enough with the contract to testify what it is—and state what it is.

A. This a copy of the contract executed between the Siemens-Lungren Gas Illuminating Company and a syndicate of gentlemen in Cincinnati, dated the 9th day of Nov., 1887.

Counsel for defendant offers the said copy of contract in evidence, and the same is handed to the notary and marked by him Exhibit "J" and made a part of this deposition.

Q. I will ask you, Mr. Wolf, whether you were aware of the fact that that contract was assigned to the Cincinnati Siemens-Lungren Gas Illuminating Co.

A. Yes, sir.

Q. I will ask you whether or not all the transactions and sales of the patent lamp and fixtures made by this company have
129 not been made under and by reason of this contract—made by either the original Chicago company or the Western Siemens-Lungren Company.

A. All shipments that have been made from Chicago or, for that matter, from Philadelphia, through the agency of the Chicago concern, have been made with reference to that contract and by reason of it.

Q. I will ask you to state whether or not you have in your possession any of the bills rendered you from time to time, either to the Chicago Gas Light Illuminating Co. or the Western Siemens-Lungren Company, for the patent of lamps and fixtures shipped you by the Philadelphia company since the date of the contract between the Cincinnati syndicate and the Siemens-Lungren Co. of Chicago. If so, can you furnish them, attach them, and make them a part of your deposition?

A. I have nothing in my possession relating to any of the affairs of either of the Chicago companies or of the Cincinnati Co. I severed my connection with the gas illuminating companies some time ago, and any papers relating to the business, so far as I know, are in the office of the company.

Q. Who is the president of the Western Company and who is its secretary?

A. I do not know.

Q. What do you mean when you say the papers are in the office of the company?

A. I mean, so far as I know, it is customary for any papers referring to any business connected with any company, that the papers can be found in their office.

130 Q. I will ask you whether or not during the time the bills were rendered to the Cincinnati Co. by either the original Chicago company or by the Western Co. reductions in prices ranging from 25 to 33 per cent. were made by the Philadelphia Co. to the Chicago companies.

A. I do not know of any such reduction and I do not positively know the extent of any reduction. I know that a reduction was made, but, to the best of my recollection, it did not amount to anything like the percentage you mention, and it was made for the reason that will appear in my direct examination.

Q. I will ask you whether at any time on the rendition of any bills to the Cincinnati company the Cincinnati company was allowed any such reduction as made by the Philadelphia Co. to the Chicago company.

A. There was none made to the Cincinnati Co., for the reason that the reduction made to the Chicago company by the Philadelphia Co., while it was a reduction to them in price as billed from Philadelphia, was really no reduction in fact. It was simply that the lamp was sent to Chicago by the Phila. Co. in a different form, in what was called knock-down form, and put together in Chicago instead of, as formerly, put together in Philadelphia, and the reduction was for the labor connected with matching the parts and putting them together and making a perfectly constructed lamp, because when that reduction was made they ceased nickeling them and sent them to us in the rough iron shape, and that reduction was made, we preferring to put them together here and to nickle them here.

Q. Is it not a fact that the Philadelphia company quoted to all others and sold to all others the articles in question at *at*
131 precisely the same prices at which they were furnished to you and complete in every particular?

A. If they did, then the Philadelphia Co. misrepresented the facts to us, and I have no knowledge of it. The Philadelphia Co. represented to us that, in consideration of their coming to us in that form, we were getting them at a lower price than they were furnishing to other people.

Q. What shape did that proposition from the Philadelphia company assume? Was it a verbal proposition or was it in writing?

A. What proposition do you refer to?

Q. I mean the proposition you refer to by reason of your doing a portion of this work and the Philadelphia Co. shipping them to you in rough shape and you putting them together, and by reason of that you getting a reduction.

A. That, to the best of my recollection, was principally verbal. There may have been some correspondence, but if there was I do not remember it.

Q. Between whom was the arrangement made?

A. Personally?

Q. Yes.

A. Between Mr. Stein and myself.

Q. Mr. Stein is a representative of the Philadelphia company?

A. President of the Philadelphia Co.

Q. And yourself?

A. Yes, sir.

Q. Mr. Wolf, is it not a fact that there is now pending in the circuit court of the U. S. for the southern district of Ohio a case brought

by the Siemens-Lungren Company, the patent company, of
132 Philadelphia, against the Cincinnati Siemens-Lungren Gas Illuminating Co., in which the former alleges that the latter has infringed the patented lamps which are the subject of these contracts, and in which bill it asks for an injunction to restrain the further infringement for damages and an accounting, and is — not a fact that the Western Co. have been notified of the pending litigation and have been requested by the Cincinnati Co. to undertake the defense, and that the Western Co. has undertaken the defense of the pending suit?

Counsel for plaintiff objects to the question as incompetent.

A. I believe that I know of some sort of suit down there, but just the nature of it and just what progress has been made I do not know, for the reason that just about the time that that sort of trouble started between Cincinnati and Chicago and Philadelphia I sold out and quit the business, and am not so conversant with anything happening then and subsequently, and, in fact, very little conversant wit what happened recently in the business, except what I know by hearsay. I have no interest financially and have not kept posted.

Q. Is it not a fact that a representative of the Philadelphia Co., upon an examination of these lamps in question which were shipped by your company, they being defective in so far that they would smoke and otherwise failed to render the service required, upon an examination of them ascertained that they were infringement of the lamp as manufactured by the Philadelphia company, and that he thereupon ordered their retirement?

A. If that is a fact I never was made acquainted with it. I did not know up to this moment what connection anybody interested
133 in the Phil. Co. had with this transaction, as to the alleged infringement or as to ordering lamps up or down, and as to the question of their smoking there have been in my experience in the business numberless times when the lamps manufactured by the Philadelphia Co. smoked, caused simply by neglect to clean the parts that should be periodically cleaned.

Q. Is it not a fact that since the entering into of the contract between the Chicago company and the Cincinnati syndicate, subsequently assigned to the Cincinnati company, the Chicago Co., notwithstanding its ground of exclusive right to the territory of Hamilton, Butler, and Montgomery counties, sold in the villages and cities of Middletown, Dayton, and Hamilton these patent lamps?

A. It is not a fact so far as your question relates to Dayton and Hamilton. It is a fact to the extent of, I believe, nine lamps in Middletown.

Q. Is it not a fact that there are now in use in Middletown over three hundred of these patent lamps sold by your own or companies other than the Cincinnati company?

A. If it is a fact I am not aware of it. I do not know of any lamps besides the nine that went to Middletown, and until now was under the impression that those nine lamps were all that were in Middletown.

Q. Did I not *you* understand you to say that after the Cincinnati Co. protested against the sale by you of any more lamps in Middletown you immediately discontinued the sale?

A. As soon as we learned that the Cincinnati Co. objected
134 to our selling lamps in Middletown we refused to ship any more lamps there—received letters from Middletown and referred the Middletown Co. to Cincinnati.

Q. Do you know the date of the protest?

A. I do not. I am speaking now of my recollection of the incidents. I do not know the dates.

Q. Is it not a fact that after March 1st, 1888, or prior to March 1st, but subsequent to the protest of the Cincinnati company and notwithstanding said protest, you nevertheless continued to sell lamps to the Middletown company?

A. So far as my recollection goes, I know nothing of the transactions with reference to that date.

Q. State how you figured the profit which you have allowed the Cincinnati company upon the lamps which you admit have been sold in Middletown.

A. I am under the impression that the profit was calculated in this manner: The difference between the price paid by Middletown and the price that the Cincinnati Co. would have had to pay us was calculated as being their profit, so that they were given the same amount of money that they would have earned if they had bought the lamps from us at the regular prices and turned them over to the Middletown Gas Co. at the prices that — were sold to the Middletown Gas Co.

Q. Is it not a fact that the difference in the price which they would have paid you for the purchase of the lamps from you and the price at which they sell them is at the rate of $33 per lamp?

135 A. I do not know what they sell their lamps at.

Q. Do you know that a payment of $2,000 was made to the original Chicago company for lamps which were afterwards claimed to be an infringement, which the Cincinnati Co. was compelled to retire from the market, and that the material and lamps are now in their possession, utterly worthless, and that no part of the $2,000 was ever returned the Cincinnati company?

Objected to by plaintiff's counsel.

A. I do not.

Q. Do you know that the 92 lamps testified to by you in your examination-in-chief as having been partly made by the Chicago company or a part of the lamps so claimed to be an infringement, and for which the $2,000 was paid?

Objected to by plaintiff's counsel.

A. I presume that the 92 lamps of which I speak in my direct examination are the lamps to which you refer in your previous question, but I do not know that they are utterly worthless and of no use.

Q. Is it not a fact that the improved style of lamp with a bye-pass lever was not furnished to the Cincinnati company until after their demand upon you and after they were aware that the parent company, the Philadelphia Co., was manufacturing and putting the same in the market, and that in compliance with their demand you then furnished the improved lamp?

Objected to by plaintiff's counsel.

A. It is not a fact. We supplied the Cincinnati — with the bye-pass lever on the lamps just as soon as we were supplied by the Philadelphia company with that style of lamp.

136 Q. Is it not a fact that your companies would send a bill for goods claimed to have been shipped to-day, but which in fact were not shipped for a period of thirty days after the rendition of such bill or a period of 30 days after the receipt by your companies of the order therefor from the Cincinnati company?

A. Never, emphatically.

Q. You state in your examination-in-chief of the contract between the parent company and the first Chicago company having been forfeited by the perent company. Please state the grounds upon which the parent company exercised such forfeiture.

Objected to by plaintiff's counsel.

A. The principal grounds was the non-payment by the Chicago company of its accounts within the specified time in the contract.

Q. Did you consent to such forfeiture?

Objected to by plaintiff's counsel.

A. Well, no; we objected to it until we were forced to it- -until we could not help ourselves.

Q. When did you first become connected with the sale of these lamps? I mean when did your practical experience in regard to their sale, care, etc., begin.

A. It began with the introduction of the lamp, with the first lamp that was made of its kind, and was something like Feb. or March, 1887, I believe.

Q. During that period of time what were you- duties with reference to the care of these lamps and what personal attention did you give them?

137 A. I had general charge of the entire business. I took charge of the selling, superintended the packing and shipping, attended to the correspondence, did the traveling, and in the city of Chicago, when I was in the city, I would go to such places as I knew were using the lamps and, with men employed for that purpose, superintend the cleaning and superintend the care given, watch to see that the lamps were giving proper satisfaction, and, if not, ordering them displaced and substituting others for them.

Q. I will ask you whether or not pending negotiations between your Western Co. and the Cincinnati Co. for the settlement of the account in question, and for which suit has been brought, you (after an allowance of claims made by the Cincinnati Co. as credits against

the account) agreed to accept as the amount due, after deduction of such claims, the sum of $3,531.50.

Counsel for plaintiff objects for the reason that said allowance and proposition will appear to have been made as a compromise of a suit opened or about to be brought, and for the further reason that said proposition would appear to have been made by letter. Objection sustained.

A. I made such a proposition as a compromise for immediate settlement, for the reason that at that time the Western Siemens-Lungren Co. was indebted to the Siemens-Lungren Co. of Philadelphia and needed the money to pay the account coming due, and rather — become involved with the Philadelphia company was willing to make a sacrifice to obtain the money.

LEOPOLD J. WOLF.

138 The further taking of these depositions is hereupon adjourned until Saturday, September 28th, 1889, between the same hours.

JOSEPH WOLF, being first duly cautioned and sworn, deposes and says as follows:

Q. State your name, age, residence, and occupation.

A. Joseph Wolf; distiller's agent and commission merchant; 79 Dearborn street, Chicago; age, 30.

Q. What, if any, connection have you with The Western Siemens-Lungren Company, plaintiff in this action?

A. I have been one of the organizers of said company from the start, and acted as one of the directors of same from the beginning of the organization.

Q. What, if any, office do you now hold in said company?

A. I am president of said company at present.

Q. You may state what official connection you had with the Siemens-Lungren Gas Illuminating Co. while it was in active business.

A. I have been the president of the Siemens-Lungren Gas Illumininating Co.

Q. What, if any, share did you take in the active management of the business of the Siemens-Lungren Gas Illuminating Company?

A. None whatever; only presided at meetings.

Q. Who was the active managing agent of said company?

A. Mr. L. J. Wolf, who was at that time secretary and treasurer of that company.

Q. I will ask you to examine the account attached to the
139 petition in this case and state if said account is due and if anything has ever been paid thereof.

A. Said account is due to the Western Siemens-Lungren Co., and to my best knowledge and belief I do not believe a cent ever has been paid on said account.

Q. I will ask you to state if the prices charged in said account are in accordance with the contract entered into between the Siemens-

Lungren Gas Illuminating Co. and the Cincinnati Siemens-Lungren Gas Illuminating Co., if you know.

A. They are.

Q. State whether or not said account is correct.

A. It is.

Q. Mr. Wolf, I will ask you to examine two letter books now handed you and state what said letter books are and by whom kept.

Counsel for defendant objects to the question on the ground that the testimony about to be introduced is not the original letters required, but mere copies.

Counsel for defendant withdraws all objections to the introduction of copies instead of original papers.

A. These letter books are the letter books of the Western Siemens-Lungren Co. and are kept by said company.

Q. You have stated that said letter books are the letter books of the Western Siemens-Lungren Company. I will ask you to examine the first of said books and state whether or not a portion of the same is not the letter book of the Siemens-Lungren Gas Illuminating Co.

Counsel for defendant objects to the question as improper.

140 A. The first part of this letter book is the letter book kept by the Siemens-Lungren Gas Illuminating Co.

Q. You may state who kept the said letter books.

Counsel for defendant objects on the ground of being incompetent.

A. Mr. L. J. Wolf, sec'y and treasurer.

Q. I call your attention to the paper now shown you and ask you to state if you are acquainted with the signature and whose signature it is.

A. I am acquainted with the signature; it is Mr. Eshelby's signature.

Counsel for plaintiff offers said letter in evidence, and the same is handed to notary and marked Exhibit "K" and made a part of this deposition.

Counsel for plaintiff offers in evidence letter of March 6, 1888, from the Siemens-Lungren Gas Illuminating Co., and counsel for defendant admits that the same is signed by E. O. Eshelby, pres't of the Siemens-Lungren Gas Illuminating Co. The same is handed to the notary and marked Plaintiff's Exhibit "L" and made a part of this deposition.

Counsel for plaintiff offers in evidence letter of March 7th, 1888, from the Siemens-Lungren Gas Illuminating Company, and counsel for defendant admits that the same is signed by E. O. Eshelby, pres't of the Siemens-Lungren Gas Illuminating Co. The same is handed to the notary and marked Plaintiff's Exhibit "M" and made a part of this deposition.

Q. I call your attention to page 234 of Letter Book "J," referred to in previous questions, and ask you to state what letter appears thereon.

Counsel for defendant objects as referring to a copy instead
141 of the original.

A. Letter to the Middletown Gas Co., dated March 3rd, 1888.

Q. I will ask you to state whether said letter is or is not an exact copy of the original thereof; and, if so, whether said original was mailed in due course to the said Middletown Gas Company.

Counsel for defendant objects on the ground of its being incompetent.

A. Said letter was sent and mailed to the Middletown Gas Company.

Counsel for plaintiff offers said page 234 of said letter book in evidence, and it is agreed between counsel that a copy of said page 234 may be handed to the notary and marked Plaintiff's Exhibit "N" and made part of this deposition, said copy to have the same force and effect as if the said letter book were so attached, but counsel for defendant objects to the introduction of said copy or said letter book on the ground of incompetency.

Q. I call your attention to page 275 of letter book referred to in previous questions and ask you to state what letter appears thereon.

Counsel for defendant objects as referring to a copy instead of the original.

A. Letter to the Middletown Gas Co. dated March 12, 1888.

Q. I will ask you to state whether said letter is or is not an exact copy of the original thereof; and, if so, whether said original was mailed in due course to the said Middletown Gas Co.

142 Counsel for defendant objects on the ground of its being incompetent.

A. Said letter was sent and mailed to the Middletown Gas Co.

Counsel for plaintiff offers said page 275 of said letter book in evidence, and it is agreed between counsel that a copy of said page 275 may be handed to the notary and marked Plaintiff's Exhibit "O" and made part of this deposition, said copy to have the same force and effect as if the said letter were so attached, but counsel for defendant objects to the introduction of said copy or said letter book on the ground of incompetency.

Q. I call your attention to page 332 of letter book referred to in previous questions and ask you to state what letter appears thereof.

Counsel for defendant objects, as referring to a copy instead of the original.

A. Letter to the Middletown Gas Co. dated March 28, 1888.

Q. I will ask you to state whether said letter is or is not an exact copy of the original thereof; and, if so, whether said original was mailed in due course to the said Middletown Gas Co.

Counsel for defendant objects on the ground of its being incompetent.

A. Said letter was sent and mailed to the Middletown Gas Co.

Counsel for plaintiff offers said page 332 of said letter book in evidence, and it is agreed between counsel that a copy of said page 332 may be handed to the notary and marked Plaintiff's Exhibit "P" and made part of this deposition, said copy to have the same force and effect as if the said letter were so attached, but counsel for defendant objects to the introduction of said copy or said letter book on the ground of incompetency.

143 Q. I call your attention to page 229 of said copy book and ask you to state what appears thereon.

Counsel for defendant objects to the question on the ground of its being incompetent, no demand having been made for the original.

A. Chicago, July 3, 1888, page 229 of copy book to the Cincinnati Siemens-Lungren Gas Illuminating Co., a letter signed by the Western Siemens-Lungren Company.

Q. Was the original of said letter mailed in due course to said Cincinnati company?

A. Yes, sir.

Counsel for plaintiff offers a copy of said page 229 in evidence, and it is agreed by counsel that said copy shall have the same force and effect as if the said page were introduced; but counsel for def't objects to introduction of the same on the ground of incompetency and no demand having been made for the original. Said copy is handed to the notary and marked Plaintiff's Exhibit "Q" and made a part of this deposition.

Counsel for plaintiff offers in evidence letter of July 9th, 1888, from E. O. Eshelby, pres't, to the Siemens-Lungren Gas Illuminating Company of Chicago, and it is agreed by counsel for defendant that the signature thereto is the signature of E. O. Eshelby as president, and the said letter is handed to the notary and marked Exhibit "R" and made a part of this deposition.

Counsel for defendant objects to the introduction of the same on the ground of its being incompetent.

Counsel for plaintiff offers in evidence letter of July 18,
144 1888, from E. O. Eshelby, pres't, to the Siemens-Lungren Gas Illu. Co. of Chicago, and it is agreed by counsel for defendant that the signature thereto is the signature of E. O. Eshelby as pres't, and the said letter is handed to the notary and marked Exhibit "S" and made a part of this deposition.

Counsel for defendant objects to the introduction of the same on the ground of its being incompetent.

Q. I call your attention to page 286 of said copy book and ask you to state what appears thereon.

Counsel for defendant objects to the question on the ground of its being incompetent, no demand having been made for the original.

A. Chicago, July 17, 1888, page 286 of copy book, Mr. E. O. Eshelby, pres't, Cincinnati, Ohio, letter signed by the Western Siemens-Lungren Co.

Q. Was the original of said letter mailed in due course to said Cincinnati company?

A. Yes, sir.

Counsel for plaintiff offers a copy of said page 286 in evidence, and it is agreed by counsel that said copy shall have the same force and effect as if the said page were introduced; but counsel for defendant objects to the introduction of the same on the ground of incompetency and no demand having been made for the original. Said copy is handed to the notary and marked Plaintiff's Exhibit "T" and made a part of this deposition.

145 Q. I call your attention to the paper now handed you and will ask you to state what it is and by whom signed.

A. Telegram to Mr. L. J. Wolf, signed E. O. Eshelby, pres't, date 7, 20, 1888.

Q. I will ask you to state if the said telegram were received by Mr. Wolf in the ordinary course of business.

A. The telegram was received by Mr. L. J. Wolf.

Counsel for plaintiff offers said telegram in evidence, and the same is handed to the notary and marked Exhibit "U" and made a part of this deposition; but counsel for defendant objects to the introduction of the same on the ground of incompetency.

Q. I call your attention to pages 300 and 314 of said copy book. State what appears thereon.

A. A telegram from the Western Siemens-Lungren Company, July 19, 1888, to E. O. Eshelby, pres't of the Cincinnati Siemens-Lungren Gas Illuminating Company.

Q. Was said telegram sent in due course at that time?

A. Yes.

Counsel for plaintiff offers copy 300 and 314 in evidence, and it is agreed that said copy shall have the full force and effect of the original pages; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the original has been served. Said copy is handed to notary and marked Plaintiff's Exhibit "V" and made a part of this deposition.

Q. I call your attention to page 318 of said copy book and ask you to state what appears thereon.

A. Letter dated July 21, 1888, from the Western Siemens-
146 Lungren Co. to Mr. E. O. Eshelby, pres't.

Q. Was said letter sent in due course of mail?

A. Yes, sir.

Counsel for plaintiff offers copy of said page 318 in evidence, and it is agreed that said copy shall have the full force and effect of the original pages; but counsel for defendant objects on the ground of

incompetency, and that no notice to produce the original has been served. Said copy is handed to the notary and marked Plaintiff's Exhibit " W " and made a part of this deposition.

Q. Please state what the paper now shown you is and by whom signed.

A. This is a letter from the Cincinnati Siemens-Lungren Gas Illuminating Company, dated July 21, 1888, and signed by the Cincinnati Siemens-Lungren Gas Illuminating Company, Chas. Ludlow, manager.

Q. Was said letter received by your company in due course of mail?

A. Yes, sir.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked by him Exhibit ' X " and made a part of this deposition; but counsel for defendant objects to the introduction of the same on the ground of its being incompetent.

Q. Please state what the paper now shown you is and by whom signed.

A. A telegram dated Cincinnati, 7, 31, 1888, signed by E. O. Eshelby, pres't, to L. J. Wolf.

Q. Was said telegram received by Mr. Wolf in due course
147 of *of* business?

A. Yes, sir.

Counsel for plaintiff offers said telegram in evidence, and the same is handed to the notary and marked Exhibit " Y " and made a part of this deposition; but counsel for defendant objects to the introduction of the same on the ground of incompetency.

Q. Please state what the paper now shown you is and by whom signed.

A. A letter from the Cincinnati Siemens-Lungren Gas Illuminating —, dated August 7, 1888; signed E. O. Eshelby, pres't.

Q. Was said letter received in course of mail by the company?

A. Yes, sir.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked Exhibit " Z " and made a part of this deposition; but counsel for defendant objects to the introduction of the same on the ground of incompetency.

Q. I call your attention to page 384 of said copy book. Please state what appears thereon and the date.

A. Letter, Aug. 8, 1888, to the Cincinnati Siemens-Lungren Gas Illuminating Co. from the Western Siemens-Lungren Company.

Q. I will ask you to state if the original of said letter in said copy book was mailed to the Cincinnati Siemens-Lungren Gas Illuminating Co. in due course.

A. Yes, sir.

Counsel for plaintiff offers in evidence said letter appearing on

page 384 of said copy book, and it is agreed that a copy of
148 the same may be handed to the notary and marked Plaintiff's Exhibit No. "1" and made a part of this deposition, and that said copy shall have the same force and effect as if the said original page were introduced in evidence; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the original has been served.

Q. Please state what the paper now handed you is, and by whom signed, and whether the same was received in due course of mail.

A. A letter, dated Cincinnati, Aug. 9, 1888, to the Siemens-Lungren Gas Illuminating Co., signed E. O. Eshebly; it was received in due time.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked Exhibit No. 2 and made a part of this deposition.

Q. Please examine page 417 of said copy book and state what appears thereon.

A. A letter signed by the Western Siemens-Lungren Company to the Cincinnati Siemens-Lungren Gas Illuminating Company, dated August 14, 1888.

Q. I will ask you to state if the same was mailed by your company to the Cincinnati company in due course.

A. Yes.

Counsel for plaintiff offers in evidence said letter appearing on page 417 of said copy book, and it is agreed that a copy of the same may be handed to the notary and marked Plaintiff's Exhibit No. 3 and made a part of this deposition, and that said copy shall have the same force and effect as if the said original page were introduced in evidence; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the original has been served.

149 Q. State what the paper now handed you is and by whom signed, and whether the same was duly received by your company.

A. Yes. The letter is dated Cincinnati, August 15th, 1888, to the Siemens-Lungren Gas Illuminating Company, and signed by E. O. Eshelby; it was duly received by us.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked by him Exhibit No. 4 and made a part of this deposition.

Q. Please examine page 429 of said copy book and state what appears thereon and whether the same was duly mailed.

A. Letter, August 17, 1888, the Cincinnati-Siemens Lungren Gas Illuminating Co., signed by the Western Siemens-Lungren Co., and was duly mailed.

Counsel for plaintiff offers in evidence said letter appearing on page 429 of said copy book, and it is agreed that a copy of the same

may be handed to the notary and marked Plaintiff's Exhibit No. 5 and made a part of this deposition, and that said copy shall have the same force and effect as if the same original page were introduced in evidence; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the original had been served.

Q. State what the paper now shown you is and by whom signed, and whether the same was duly received.

A. Letter, dated Cincinnati, August 23, 1888, to the Siemens-Lungren Gas Illuminating Co., Chicago, Ill., signed E. O. Eshelby, pres't, and was duly received.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked by him Exhibit No. 6 and made a part of this deposition.

Q. Examine page 431 of said copy book and state what
150 appears thereon and whether the same was duly mailed.

A. August 7, 1888, Cincinnati Siemens-Lungren Gas Illuminating Co., signed by the Western Siemens-Lungren Co., and was duly mailed.

Counsel for plaintiff offers in evidence said letter appearing on page 431 of said copy book, and it is agreed that a copy of the same may be handed to the notary and marked by him Exhibit No. 7 and made a part of this deposition, and that said copy shall have the same force and effect as if the said original page were introduced in evidence; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the original has been served.

Q. State what the paper now handed you is, by whom signed, and whether the same was duly received.

A. It is a letter dated Cincinnati, August 23, 1888, Mr. L. J. Wolf, signed E. O. Eshelby, president, and was duly received.

Counsel for plaintiff offers said letter in evidence, and the same is handed to the notary and marked Exhibit No. 8 and made a part of this deposition, but counsel for defendant objects to the introduction of the same on the ground of incompetency.

Q. Please examine pages 36, 49, 62, and 95 of said copy book and state what appears thereon.

A. There appears on page 36 a letter dated September 11, 1888, to Mr. E. O. Eshelby, president, signed by the Western Siemens-Lungren Company, which was mailed in due course. On page 49 there appears a telegram to the Cincinnati Siemens-Lungren Gas
Illuminating Co., dated September 14, 1888, which was mailed
151 in due course. P. 62 there appears a letter to Mr. E. O. Eshelby, pres't, dated Sept. 18, 1888, signed by the Western Siemens-Lungren Co., which was mailed in due course. On page 95 there appears a letter to Mr. E. O. Eshelby, pres't, dated October

11, 1888, signed by the Western Siemens-Lungren Company, which was mailed in due course.

Counsel for plaintiff offers in evidence said letters appearing on pages 36, 49, 62, and 95 of said copy book, and it is agreed that a copy of the same may be handed to the notary and marked by him Exhibit- Nos. 9, 10, 11, and 12 and made part of this deposition, and that said copies shall have the same force and effect as if the said original pages were introduced in evidence; but counsel for defendant objects on the ground of incompetency, and that no notice to produce the originals has been served.

Q. I will ask you to state, Mr. Wolf, whether you have made diligent search for any other letters from Mr. Eshelby or the Cincinnati company to either of your companies; and, if so, whether or not you have failed to find any others than those offered in evidence.

A. I have made a search for the letters and I miss the following letters: Letters dated September 13 and 25th, 1888.

152 Cross-examination:

Q. I will ask you whether those are the only letter- you miss.

A. These are the only letters I miss.

Q. Did you not receive a letter dated February 11, 1888, in which the Cincinnati company, through Mr. Eshelby, its pres't, protested against your sale of any of the patent lamps in the city of Middletown, Ohio?

A. Not to my knowledge.

Q. The present bill of goods, the bill upon which suit is brought in this case, as well as all other bills rendered the Cincinnati company, were under and by reason of a contract entered into between the Cincinnati syndicate and the first Chicago company, were they not? And is not that the only contract existing between either of the two companies, either the two Chicago companies, and the Cincinnati company?

A. I believe it is.

Q. I will ask you whether or not it is not a fact that the Philadelphia company made a reduction on the bills sold to Chicago companies from time to time, averaging between 25 and 33 per cent., of which the Cincinnati company never received the benefit in the rendition of the bills to it, including the bills which have been paid as well as the bill now in suit.

A. I had no management of the company, and therefore I could not answer either of the questions. Mr. L. J. Wolf had full management.

Q. Do I understand you to say that you do not know the prices which are paid from time to time by your Chicago companies
153 to the parent company?

A. Yes, sir.

Q. Who kept the books of the company?

A. L. J. Wolf, secretary and treasurer.

Q. Have you now in your possession the books of either the Siemens-Lungren Co., the first Chicago Co., or the Western Co. of Chicago?

A. I believe there are some. I cannot exactly tell what they are.

Q. Have you in your possession any of the bills rendered by the parent Co. to the Chicago companies from time to time?

A. I could not say.

Q. Will you make an examination and search and furnish me with such bills which may have been rendered during the period of the contract between the Chicago Co. and the Cincinnati Co.?

A. I will do my best to find the bills.

Counsel agree that if the bills referred to in the previous question can be found by the witness that the same may be sent to counsel for plaintiff, and that thereupon the same shall be attached to these depositions in Cincinnati and considered in all respects to have the same force and effect as if the same had been attached at the present time.

Q. Are all papers of the Chicago companies in your possession; and, if not, in whose possession are any others?

A. I have possession of part of the papers. Part of the papers are in the possession of the former secretary, Mr. Adolph Wolf.

Q. Who is Mr. Adolph Wolf, what is his occupation, and where is he to be found?

154 A. He is at present in the stock yards. He is a wholesale butcher. He can be found at the stock yards in this city.

Q. What was Mr. Adolph Wolf's connection with either of the Chicago companies?

A. He has been secretary for the Western Siemens-Lungren Company.

Q. Was he connected with the first company?

A. No, sir.

Q. Is he secretary at present?

A. No, sir. He ceased to be secretary on Dec. 10, 1888.

Q. Who has been acting as secretary since?

A. Harry Hyams.

Q. He is the present secretary?

A. Present secretary and resident of Chicago.

Q. What business is he in?

A. Correspondent for the Bonforth Wine and Spirit Review.

Q. Do you know whether or not there is not pending in the circuit court of the U. S. for the southern district of Ohio a suit wherein The Siemens-Lungren Co. of Philadelphia is plaintiff and The Cint'i Siemens-Lungren Gas Illuminating Co. is defendant, wherein the former company alleges that an infringement of the patent of lamps sold by the Chicago Co. to the Cincinnati company has been made, by the defendant asking for an injunction restraining it from further infringement, for damages, and for an accounting, and that the Chicago Co. was notified of the pendency of the suit and requested to undertake the defense, and that it is now defending on behalf of the Cincinnati Co.?

A. I do.

155 Counsel for plaintiff objects to the question.

Q. Do you not know that the Chicago companies during the time of the contract between it and the Cincinnati company, and notwithstanding the fact that they had covenanted in their contract to the exclusive sale of the lamps in the territory of Montgomery, Hamilton, and Butler counties, have sold lamps in Middletown, Hamilton, and Dayton?

A. I do not.

Q. Do you know that there are in use in Middletown alone over 300 lamps of the Philadelphia patent that have been sold by companies other than the Cincinnati Co.?

A. I do not.

Q. I understand you to say that you know nothing whatever about the practical management of the affairs of your company; that you never gave your personal attention to the subject of repairs, alterations, renewals, etc., on lamps in use by consumers?

A. Yes, sir.

Q. State whether or not you know that the Cincinnati company gave the sum of $2,000 for lamps which were alleged to be an infringement, and for the infringement of which the suit is pending, which lamps were furnished by your Chicago companies to the Cincinnati Co., and which lamps the Cincinnati Co. was compelled to retire from the market, and which now remain on its hands as dead stock, utterly worthless and useless, and that the Chicago companies have returned no part of the $2,000.

A. I do not.

Q. Do you know that the 92 lamps testified to by Mr. L. J. Wolf as being part of lamps stated by him to have been partly
156 made in Philadelphia were in his estimation part of the lamps for *for* which the company paid the sum of $2,000 and which are now held by it as dead stock?

A. I do not.

Q. Do you know that the Chicago companies were furnishing from time to time an old-style lamp to the Cincinnati company when, in fact, the Philadelphia, the parent, company was manufacturing and selling an improved lamp with a bye-pass lever?

A. I do not.

Q. Who had charge of the shipment of the orders as made from time to time by your subcompanies?

A. Mr. J. L. Wolf.

Q. Then you have no persona- knowledge of the shipment of any goods from time to time?

A. I have not.

Q. Did Mr. L. J. Wolf also bill the goods?

A. Yes, sir.

Q. State briefly what your duties were in connection with the Chicago companies.

A. With the first company I have been president; attended only to the meetings of the said company. The second company, I have been a director up to December 10, 1888, when Mr. L. J. Wolf sold,

and I was elected president of said company. My duties since that time have been managing the company and carrying on the business for the company.

Q. State whether or not the contract introduced in testimony yesterday between the Western Co. of Chicago and the parent company of Philadelphia has not now been declared forfeited by
157 the parent company.

Counsel for plaintiff objects to the question.

A. It has.

Q. State whether or not you have acquiesced in the declared forfeiture.

Counsel for plaintiff objects to the question.

A. I did not.

Q. State whether or not there is any claim in litigation now between your Chicago companies in reference to damages under the contract.

Counsel for plaintiff objects to the question.

A. Yes.

Q. State where the suit is pending and what shape it has assumed.

Counsel for plaintiff objects to the question.

A. Pending in the U. S. court in Chicago.

Q. In what shape is it—a suit for damages?

Counsel for plaintiff objects to the question.

A. In my attorneys' hands, and they are attending to it.

Q. You do not know what shape it is in?

Counsel for plaintiff objects to the question.

A. No.

Redirect examination:

Q. Please state whether or not the differences between the Western Siemers-Lungren Co. and the parent company of Philadelphia have been in process of adjustment and compromise for some time past.

A. They have.

Q. You may state whether that includes all of the differ-
158 ences between you, including the forfeiture of the contract.

A. It does.

Q. State whether you or any one acting for the Western company ever assented or acquiesced in the forfeiture of the contract by the parent company in any way.

A. No.

JOSEPH WOLF.

159 EXHIBIT "A." W. K. Lowrey, Commissioner.

STATE OF ILLINOIS, DEPARTMENT OF STATE.

Henry D. Dement, Secretary of State.

To all to whom these presents shall come, Greeting:

Whereas a statement duly signed and acknowledged has been filed in the office of the secretary of state on the 14th day of April, A. D. 1888, for the organization of the Western Siemens-Lungren Company under and in accordance with the provisions of "An act concerning corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereto attached:

And whereas a license has been issued to Julius Schweitzer, Bernard A. Smith, and Andrew Gillespie, as commissioners, to open books for subscriptions to the capital stock of the said company;

And whereas the said commissioners have on the 1st day of May, A. D. 1888, filed in the office of the secretary of state a report of their proceedings under said license, a copy of which report is hereto attached;

Now, therefore, I, Henry D. Dement, secretary of state of the State of Illinois, by virtue of the power vested in me by law, do hereby certify that the said The Western Siemens-Lungren Company is a legally organized corporation under the laws of this State.

In testimony whereof I hereunto set my hand and cause to be affixed the great seal of State. Done at the city of Springfield this 1st day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United
160 States the one hundred and 12th.

[Seal of the State of Illinois, Aug. 26, 1818.]

HENRY D. DEMENT,
Secretary of State.

STATE OF ILLINOIS, } ss.
Cook County, }

To Henry D. Dement, secretary of state:

We, the undersigned, Julius Schweitzer, Bernard A. Smith, and Andrew Gillispie, propose to form a corporation under an act of the General Assembly of the State of Illinois, entitled "An act concerning corporations," approved April 18, 1872, and all acts amendatory thereof, and that for the purposes of such organizations we hereby state as follows, to wit:

1. The name of such corporation is the Western Siemens-Lungrwen Company.

2. The object for which it is formed is to manufacture, buy, sell, and deal generally in illuminating lamps, fixtures, and materials, and in letters patent covering or relating to the same, and to buy and sell the territorial rights and privileges in and to any and all letters patent and patented articles *of* covering or relating to illumi-

nating lamps, fixtures, and materials, and to buy, sell, and deal generally in letters patent granted or issued or which may be granted or issued by the United States or any other government for or covering or including or relating to illuminating lamps, fixtures, and materials and any and all contracts, rights, privileges, or licenses relating to the same, and to issue and grant contracts, rights, licenses and privileges to persons or corporations to buy, sell, use, manufacture, vend, or rent illuminating lamps, fixtures, and ma-
161 terials belonging to this company or in which or *or* the letters patent relating to the same this company is in anyway interested.

3. The capital stock shall be seven thousand five hundred dollars.

4. The amount of each share is ten dollars.

5. The number of shares seven hundred and fifty.

6. The location of the principal office is in Chicago, in the county of Cook, State of Illinois.

7. The duration of the corporation shall be fifty years.

JULIUS SCHWEITZER.
BERNARD A. SMITH.
ANDREW GILLESPIE.

STATE OF ILLINOIS, }
County of Cook, } *ss*:

I, George Einstein, a notary public in and for the county and State aforesaid, do hereby certify that on this 13th day of April, A. D. 1888, personally appeared before me Julius Schweitzer, Bernard A Smith, and Andrew Gillespie, to me personally known to be the same person- who executed the foregoing statement, and severally acknowledged that they had executed the same for the purposes therein set forth.

In witness whereof I have hereunto set my hand and seal the day and year above written.

GEORGE EINSTEIN,
[SEAL.] *Notary Public.*

162 To Henry D. Dement, secretary of state of the State of Illinois:

The commissioners duly authorized to open books of subscription to the capital stock of the Western Siemens-Lungren Company pursuant to license heretofore issued, bearing date the 14th day of April, A. D. 1888, do hereby report that they opened books of subscription to the capital stock of said company, and that the said stock was fully subscribed; that the following is a true copy of such subscription, viz:

We, the undersigned, hereby severally subscribe for the number of shares set opposite — respective names to the capital stock of the Western Siemens-Lungren Co., and we severally agree to pay the said company for each share the sum of ten dollars.

Name.	Share.	Amount.
Leopold K. Wolf	200	$2,000 00
Louis Powell	190	1,900 00
Adolph Wolf	10	100 00
Joseph Wolf	200	2,000 00
M. Schweisthal	150	1,500 00
	750	$7,500 00

That on the 30th day of April, A. D. 1888, at the office of the International bank, No. 110 La Salle St., Chicago, Ill., at the hour of 11 o'clock a. m., they convened a meeting of the subscribers aforesaid pursuant to notice required by law; which said notice was deposited in the post office, properly addressed to each subscriber, ten days before the time fixed therein, a copy of which said notice is as follows, to wit:

163 To Leopold J. Wolf, Louis Powell, Adolph Wolf, Joseph Wolf, and M. Schweisthal:

You are hereby notified that the capital stock of the Western Siemens-Lungren Company has been fully subscribed, and that a meeting of the subscribers of such stock will be held at the office of the International bank, No. 110 La Salle St., Chicago, Illinois, on the 30th day of April, A. D. 1888, at 11 o'clock a. m., for the purpose of electing a board of directors for said company and for the transaction of such other business as may be deemed necessary.

(Signed) JULIUS SCHWEITZER,
BERNARD A. SMITH,
ANDREW GILLESPIE,
Commissioners.

That said subscribers met at the time and place in said notice specified and proceeded to elect directors, and that the following persons were duly elected for the term of one year, viz: Michael Schwersthat, Louis Powell, Adolph Wolf.

JULIUS SCHWEITZER,
ANDREW GILLESPIE,
BERNARD A. SMITH,
Commissioner-.

164 STATE OF ILLINOIS, } *ss:*
County of Cook, }

On this 30th day of April, A. D. 1888, personally appeared before me, a notary public in and for said county, in said State, Julius Schweitzer, Bernard A. Smith, and Andrew Gillespie, and they and each of them made oath that the foregoing report by them subscribed is true in substance and in fact.

DWIGHT W. GRAVES,
[SEAL.] *Notary Public in and for said County and State.*

No. 968,724; recorded June 11, 1888, at 4 p. m.
WILEY S. SCRIBNER, *Recorder.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Wiley S. Scribner, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the 11th day of June, A. D. 1888, as document No. 968,724 and recorded in Book 26 of Records, at page 254.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Chicago, this 26th day of September, A. D. 1889.

[SEAL.] WILEY S. SCRIBNER, *Recorder.*

165 STATE OF ILLINOIS, } ss:
County of Cook, }

I, Richard Prendergast, presiding justice of the county court of the county and State aforesaid, do hereby certify that the certification hereto annexed under the attestation and official seal of the recorder of Cook county and State of Illinois is in due form, and that the said Wiley S. Scribner, whose signature is thereto attached, is the recorder of deeds for the county and State aforesaid, and is the proper officer to make such certificate and attestation.

In testimony whereof I have hereunto set my hand and seal this 27th day of September, A. D. 1889.

[SEAL.] RICHARD PRENDEGAST.

Clerk's Certificate of Judge's Signature.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, Henry Wulff, clerk of the county court of Cook county, in the State of Illinois (said court being a court of record), do hereby certify that the Hon. Richard Prendegast, whose name is subscribed in the annexed and foregoing certificate, was at the time of signing thereof and now is the county judge of said Cook county and sole presiding judge of said county court of Cook county, duly elected, commissioned, and qualified, and that his said signature is genuine.

In witness whereof I have signed my name and affixed the seal of said county court, at my office, in the city of Chicago, in said Cook county, this 27th day of September, 1889.

HENRY WULFF, *Clerk.* [SEAL.]

166 COPY OF EXHIBIT B & C. William Lowrey, Commissioner.

The following proposition from the Siemens-Lungren Gas Illuminating Co. was read:

We offer to sell to your company for the sum of twelve thousand dollars all our property, assets, and good will, and our entire plant, including all our contracts with the Siemens-Lungren Co. of Philadelphia, Pa., and all our contracts with subcompanies organized in

the cities of Chicago, Cincinnati, and St. Louis, and capital stock of the Chicago Gas Lamp Illm. Co. to the amount of ten thousand dollars, par value. Merchandize that we propose transferring to you is evidenced by the accompanying inventory.

On motion duly made and seconded, the proposition was placed on file and the president was appointed a committee of one to verify the list of merchandize given in the (C) inventory of the Siemens-Lungren Gas Illuminating Co. and to examine all contracts in their *in their* possession, and was requested to report the result at a special meeting of the board to be held at the office of the International bank Wednesday, May 9, at 12 o'clock m.

There being no further business presented, the board adjourns.

ADOLPH WOLF, *Sec'y.*

Exact copy of papers (10) ten and eleven (11) of minute book of company, marked by me as Exhibits "B" and Exhibit "C," counsel agreeing that said copy made by stenographer may be offered in lieu of said minute book.

WILLIAM LOWREY,
Commissioner.

167 COPY OF EXHIBIT "D" AND EXHIBIT "E." W. K. Lowrey, Commissioner.

Special meeting held May 9, 1888, A. D., 12 m., at the office of the International bank.

All members of the board being present, the minutes of the previous meeting being read, and on motion duly made and seconded were adopted, the president reported that he had carefully examined the merchandize owned by the Siemens-Lungren Gas Illuminating Co., and that he had compared the count made by him with the inventory furnished by the Siemens-Lungren Gas Illuminating Co. and found the inventory correct. He also reported that he had examined the contracts in possession of the Siemens-Lungren Gas Illuminating Co., and he believes them to be as represented and in good legal form.

On motion duly made and seconded, the president's report was adopted. On motion duly made and seconded, it was resolved that this company do accept the proposition of the Siemens-Lungren Gas Illuminating Co. upon the following terms:

Cash	$7,250 00
Ten days	250 00
Thirty "	1,500 00
Ninety "	2,300 00
Four months	700 00
Total	$12,000 00

On motion, the board adjourned.

ADOLPH WOLF, *Sec'y.*

Exact copy of papers 12 and 13 of minute book of company marked by me as Exhibits "D" and Exhibit "C," counsel agreeing that said copy made by the stenographer may be offered and attached hereto in lieu of said minute book.

WILLIAM LOWREY,
Commissioner.

168 EXHIBIT "F." W. K. Lowrey, Commissioner.

Whereas, the Siemens-Lungren Company, a corporation of the State of Pennsylvania, party of the first part hereto, and Leopold J. Wolf, of the city of Chicago, party of the second part hereto, have this day entered into a certain agreement relating to the exclusive sale by the party of the second part, in the States of Ohio, (excepting certain counties therein excepted) Indiana, Illinois, Wisconsin, Missouri, Michigan, Iowa and Minnesota, of the gas lamps and burners manufactured and sold by the party of the first part, and other things as by reference to the said agreement will fully and at large appear:

Now, this agreement, witnesseth, that in consideration of the said agreement, and as a part thereof, the parties do hereby further agree together, as follows; to wit:

That the said Leopold J. Wolf, shall have the privilege of assigning the said contract to a corporation to be created under the laws of the State of Illinois, having a paid-up capital of seven thousand five hundred dollars; provided that the said Leopold J. Wolf, shall be a corporator thereof, and that Michael Schweisthal of the city of Chicago, or in his said stead, two other responsible persons shall be associated with him as corporators thereof; provided, however, that no such assignment shall be valid until the assignee shall be substituted as a party to the said contract instead of the said Leopold J. Wolf, and shall be bound to perform the things therein stipulated to be performed and shall have the right to enforce the covenants of the Siemens-Lungren Company as if it had been the original party thereto; and said Siemens-Lungren Co. agrees to execute such
169 endorsed or new agreement, when the *when the* conditions above stipulated for are complied with.

Witness the signature of the president of said Siemens-Lungren Company, and its corporate seal, duly attested, and the hand and seal of said Leopold J. Wolf, this 6th day of April, A. D. 1888.

In presence of—
—— PETTIT.
R'M'L M. SCHICH.

THE SIEMENS-LUNGREN COMPANY,
By E. S. STEIN, *Pres't.*
H. A. BROGNARD, *Sec'y.*
Attest: H. A. BROGNARD, *Sec'try.*
LEOPOLD J. WOLF. [SEAL.]

170 EXHIBIT "G." W. K. Lowrey, Commissioner.

Article of agreement, made and concluded this 28th day of June, A. D. 1888, between Leopold J. Wolf of the first part, the Western Siemens-Lungren Company, a corporation organized under the laws of the State of Illinois, of the second part, and the Siemens-Lungren Company, a corporation organized under the laws of the State of Pennsylvania of the third part, witness,

The party of the first part hereby assigns to the party of the second part the contract between him and the party of the third part, relating to the sale in the States of Ohio, Indiana, Illinois, Wisconsin, Missouri, Michigan, Iowa and Minnesota of the gas lamps and burners manufactured by the said party of the third part, the said contract bearing date the sixth day of April A. D. 1888, to hold to the said party of the second part, its successors and assigns from henceforth to its own proper use, benefit and behoof.

In consideration whereof, and of the covenants of the party of the third part hereinafter contained, the party of the second part hereby agrees to perform all the things stipulated in the said contract to be performed by the said party of the first part, as fully and with the same effect as if the said contract had originally been made by it alone.

In consideration of the foregoing assignment of the party of the first part, and of the covenant of the party of the second part, the party of the third part agrees to accept the said party of the second part as a party to the said agreement and to substitute it for
171 the said Leopold J. Wolf, who is party of the second part to that agreement and further the party of the third part hereto agrees to perform all things for the said party of the second part which it has in the said agreement agreed to perform.

And it is further agreed that each and all of the stipulations and conditions in said agreement contained shall hereafter operate as between the said Siemens-Lungren Co., and the said Western Siemens-Lungren Co. with the same force and effect as though the said agreement of date 6th of April, 1888, had been originally made between said two companies. This agreement is attached to said original agreement between the Siemens-Lungren Company and L. J. Wolf dated 6th of April, 1888, hereinbefore referred to.

In witness whereof, the said Leopold J. Wolf, has hereunto set his hand and seal, and each of the other parties have caused these presents to be signed by its president and sealed with its corporate seal, duly attested, the day and year aforesaid.

LEOPOLD J. WOLF. [SEAL.]
THE WESTERN SIEMENS-LUNGREN CO.
L. J. WOLF, *Pres't.*
Attest: L. J. WOLF. [SEAL.]
Witness:
J. F. ENOLAT.
THE SIEMENS-LUNGREN CO.
E. STEIN, *Pres't.*
Attest: H. A. BROGNARD, *Sec'y.* [SEAL.]

172 EXHIBIT "H." W. K. Lowrey, Commissioner.

Article of agreement, made and concouded this 28th day of June A. D. 1888, between th- Siemens-Lungren Company a corporation of the State of Pennsylvania, of the first part and the Western Siemens-Lungren Company a corporation of the State of Illinois of the second part.

Whereas the said party of the second part is assignee of a certain contract between the party of the first part and one Leopold J. Wolf, relating to the sale in the States of Ohio, Indiana, Illinois, Wisconsin, Missouri, Michigan, Iowa and Minnesota of the gas lamps and burners manufactured by the said party of the first part, the said contract bearing date the sixth day of April, A. D. 1888.

And whereas, the said party of the second part is also assignee of certain contracts relating to the sale of the said lamps made by the Siemens-Lungren Gas Illuminating Co. of Chicago State of Illinois, with Charles Henrotin, relating to the sale thereof in Cook county, Ill., and with Joseph Specht, relating to the sale thereof in St. Louis county and city, in the State of Missouri and A. Hickenlooper and others, relating to the counties of Hamilton, Butler and Montgomery in the State of Ohio.

And whereas it was also agreed by the party of the first part with the said Leopold J. Wolf, on the said sixth day of April A. D. 1888, that it would, on request of the said Leopold J. Wolf, or of any company to which he should assign his said contract, make certain contracts with him or it relating to said last-mentioned

173 contracts made by the Siemens-Lungren Gas Illuminating Co. of Chicago, and as the said Leopold J. Wolf, and the Western Siemens-Lungren Company, his assignee as aforesaid have made such requests

Now these articles witness that in consideration of the foregoing the party of the first part hereto covenants and agrees with the party of the second part, that should the party of the second part cease to represent the party of the first part in the control of the sale of the said lamps and burners in the States before mentioned, then it, the said party of the first part will supply to the Chicago Gas Lamp Illuminating Company, and to the St. Louis Illuminating Gas Lamp Company, and to the Cincinnati Siemens-Lungren Gas Illuminating Co., to whom respectively the said several contracts have been assigned any of its patented burners of lamps, or other fixtures pertaining thereto, that during the lifetime of the said patents may be ordered by the said companies from the party of the first part, either directly or through a third person at the prices and upon the terms specified in the contracts existing between the said Siemens-Lungren Gas Illuminating Co. and the said persons and companies respectively.

And the party of the first part also covenants and agrees to and with the said party of the second part that it will give to the Chicago Gas Lamp Illuminating Company the exclusive privilege in Cook county in the State of Illinois, and to the St. Louis Illuminating

Gas Lamp Company the exclusive privilege in St. Louis city and county in the State of Missouri, and to the Cincinnati Siemens-Lungren Gas Illuminating Company the exclusive privilege for the counties of Hamilton, Butler and Montgomery, in the State of Ohio, of renting and selling all gas lamps and burners manufactured under patents now in possession of the party of the first part, or under any patents of which it may become possessed for the
174 lifetime of the said patents.

Provided, however, that if the party of the second part should cease to represent the party of the first part, this agreement shall then bind the said Siemens-Lungren Company of Pennsylvania to grant the exclusive privilege, and sell its patented burners and lamps to said Chicago Gas Lamp Illuminating Company, St. Louis Illuminating Gas Lamp Co., and to the Cincinnati Siemens-Lungren Gas Illuminating Company and each of them, respectively only so long as it shall from that time on its part perform and fulfill the terms and conditions of its contract at present existing with the Siemens-Lungren Gas Illuminating Company of Illinois, a true copy whereof is hereto annexed as part of this agreement.

In testimony whereof each of the parties hereto have caused these presents to be signed by their president and sealed with its corporate seal, duly attested, the day and year aforesaid.

THE WESTERN SIEMENS-LUNGREN CO.
L. J. WOLF, *President.*
Attest: L. J. WOLF. [SEAL.]

Witness:
J. F. PENOLAT.

THE SIEMENS-LUNGREN CO.
E. STEIN, *President.*
Attest: H. A. BROGNARD, *Sec'y.* [SEAL.]

175 EXHIBIT "I." W. K. Lowrey, Commissioner.

Agreement made this 22nd day of April, A. D. 1887, between the Siemens-Lungren Company, a corporation of the State of Pennsylvania, party of the first part and Joseph Wolf, of the city of Chicago party of the second part.

Whereas the said Siemens-Lungren Company is engaged in the manufacture and sale of improved regenerative gas-burners under divers letters patent of the United States of which it is the owner or licensee.

And whereas said Joseph Wolf desires to obtain the exclusive right within the State of Ohio (exclusive of the counties of Mahoning, Columbiana, Jefferson and Belmont) to sell and use or license to others to be used, said patented gas-burners so manufactured as aforesaid, for and during the life of all the patents and licenses owned by said company.

Now therefore these presents witness that said parties have and do hereby agree each with the other as follows, to wit:

I. That during the period covered by the licenses and patents

owned by the said Siemens-Lungren Company or of which it may hereafter become the owner, and all future improvements thereon and reissues of the same of which it may become possessed so far as they relate to regenerative gas-burners, said Siemens-Lungren Company agrees to sell exclusively to said Joseph Wolf for use or sale or license to others to be used within the State of Ohio, except the counties of Mahoning, Columbiana, Jefferson and Belmont, as to which it is hereby and finally agreed that this agreement shall not operate gas-burners to be manufactured by it and will not
176 knowingly sell to other parties whomsoever gas-burners for sale or use within the said territory above mentioned, but will on the contrary to the best of its ability prevent the sale or use of gas-burners manufactured by it within said territory by any other party than said Joseph Wolf, his vendees or licensees.

This agreement does not apply to sales to corporations engaged in railroad or transportation business whose lines pass through said State of Ohio but said Joseph Wolf shall have the right, but not the exclusive right to sell or license burners to such corporations.

II. Said Siemens-Lungren Company will supply said Joseph Wolf with such and so many of its patented burners as may be ordered by him within a reasonable time and within sixty days after receipt of such order, and at a price which shall be fifty per sent. less than the list price established by said Siemens-Lungren Company, which said list price shall be uniform throughout the United States east of the Mississippi river.

Said Siemens-Lungren Co. will also supply said Joseph Wolf with all such unpatented fixtures as may be appurtenant to said gas-burners at a discount to be mutually agreed upon. Deliveries to be made on board cars at Philadelphia but above prices not to include boxes.

III. This agreement is entered into by said Siemens-Lungren Company with said Joseph Wolf as well in consideration of the sum of one dollar to it by him paid, the receipt whereof is hereby acknowledged and of divers other good and valuable considerations, as of the covenant and agreement which the said Joseph Wolf hereby makes with said Siemens-Lungren Co. that he the said
177 & 178 Joseph Wolf, and his assigns will use all due and proper diligence and energy for the purpose of introducing the said burners into public use in the State of Ohio (except the counties aforesaid) and that he or they will purchase from said Siemens-Lungren Co. burners to the value of ten thousand dollars per year for the first five years next ensuing after the date of this contract, and to the value of five thousand dollars per year thereafter during the term of this contract, and will pay for the same to said company the said sums of ten thousand dollars and five thousand dollars yearly respectively as stipulated and that in the event of his or their failure so to do the said Siemens-Lungren Company shall have the right itself to solicit purchasers and fill orders within the territory above mentioned without liability to account to said Joseph Wolf, or his assigns.

IV. Said Joseph Wolf agrees to pay said Siemens-Lungren Co.

in cash for all lamps ordered by him at the price hereinbefoer stated monthly, upon the fifteenth day of each and every month for all lamps delivered to him as aforesaid during the calander month next preceeding.

V. Said Siemens-Lungren Company agrees to defend said Joseph Wold and all purchasers and licensees from him, and at its proper cost and expense, against any and all suits for alleged infringements of letters patent brought against him or them by reason or on account of the use or sale of burners purchased from it provided that written notice is given to it of the commencement of any such proceeding at the beginning thereof and that it is given exclusive control of said litigation thereafter.

VI. The agreement and covenants hereinbefore contained shall extend to and bind the heirs, executors, administrators, suc-
179 cessors, and assigns of each of the parties hereto.

In witness whereof the said Siemens-Lungren Company has caused these presents to be signed by its president and its corporate seal to be hereunto affixed duly attested and the said Joseph Wolf, has hereunto set his hand and seal this the day and year first above written.

THE SIEMENS-LUNGREN CO.
E. STEIN, *President.* [SEAL.]

Attest: H. A. BROGNARD, *Sec'ty.*

JOSEPH WOLF. [SEAL.]

Sealed and delivered in presence of—

—— ——.
—— ——.

For and in consideration of the sum of one (1) dollar to me in hand paid, the receipt whereof is hereby acknowledged, as well as for other good and valuable considerations, I hereby sell, assign, and set over unto the Siemens-Lungren Gas Illuminating Co. all my right, title, and interest in and to the foregoing and within contract.

JOSEPH WOLF.

We, the Siemens-Lungren Gas Illuminating Company, accept the assignment of the within contract.

THE SIEMENS LUNGREN GAS ILLU. CO.
[SEAL.] JOSEPH WOLF, *Pres't.*

180 DEFENDANT'S EXHIBIT "J." W. K. Lowrey, Commissioner.

Whereas the Siemens-Lungren Gas Illuminating Company of Chicago, Ills. has acquired certain valuable rights, franchises and privileges from the Siemens-Lungren Company a corporation of the State of Penn., viz: the exclusive privilege of selling, placing and operating the patented and other manufactured articles and appliances of the said company throughout the State of Ohio by an agreement entered into by and between said Siemens-Lungren Co. and one Joseph Wolf, on the 22nd day of April 1877, and by said Wolf,

subsequently assigned to the Siemens-Lungren Illuminating Company of Chicago, Ills. and

Whereas said last-named corporation is now desirous of conveying to other parties the rights, franchises and privileges acquired by it so far as the same applies to the counties of Hamilton, Butler and Montgomery in the State of Ohio now therefore.

This contract entered into this 9th day of November 1887 by and between the Siemens-Lungren Illuminating Company of Chicago, Ills. party of the first part, and A. Hickenlooper, Samuel W. Trost, J. A. S. Gray, D. L. Billingheimer, Chas. B. Wing, Moses Krohn, James Allison, Chas. Fleischmann, Fred. H. Alms and E. O. Esheiby, parties of the second part, witnesseth:

First. That said Siemens-Lungren Gas Illuminating Co. for themselves their successors and assigns for and in consideration of the sum of one dollar and other valuable considerations the receipt of which is hereby acknowledged do hereby assign, set over and convey to said parties of the second part the sole and exclusive right and privilege of selling, placing and operating throughout the counties of Hamilton, Butler, and Montgomery, State of Ohio, all
181 the patented regenerative, or other gas lamps, appliances, or fixtures, which are now, or may hereafter, be made, owned or controlled by the said Siemens-Lungren Company, or its assigns, the Siemens Gas Illuminating Company.

That during the entire period covered by the licenses and patents now owned by the said Siemens-Lungren Company, or which may hereafter be acquired on improvements and reissues, the said Siemens-Lungren Gas Illuminating Company will sell exclusively to said parties of the second part for use in the counties before named all the burners, fixtures and appliances, made by said Siemens-Lungren Company and will not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned or controlled by said Siemens-Lungren Co. but will upon the contrary to the best of their ability prevent the sale of any such articles for use within the territory named to any other than the parties of the second part their successors or assigns.

That said Siemens-Lungren Gas Illuminating Company will sell to said parties of the second part, their successors or assigns the most approved form of regenerative lamps now, or which may hereafter be, made by said Siemens-Lungren Company at the following prices for the first one thousand lamps ordered 8-ft. lamp $17.50; 12-ft. lamp $19.00 and 16-ft. lamp $20.50 with two extra glass globes for each lamp, and that for all lamps ordered in excess of the first one thousand the price is to be for 8-ft. lamps $16.50 for 12-ft. lamps $18.00 and 16-ft. lamps $19.50 with freight added, and that they will sell any new sizes or styles of lamps, fixtures or appliances at the same proportionate rate of discount from present or future manufacturers' list prices which shall be uniform throughout the United States and in case the Siemens-Lungren Co. shall at any time in the future make any reduction in the price of goods furnished to
182 or through the Siemens-Lungren Gas Illuminating Company

the last-named company shall make a corresponding reduction to the parties of the second part.

The said goods to be delivered in good order and condition to any designated agent of the parties of the second part at said agent's office in the city of Cincinnati in lots of 300 or less within 30 days after receipt of such order for delivery. That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five (5) years, exclusive of any globes broken or other damage done through careless handling and that it will defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named. And that upon the expiration of said period of five years they will if the parties of the second part so desire guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid the additional sum of three (3) dollars for each lamp thus guaranteed.

That the said Siemens-Lungren Gas Illuminating Company will defend the parties of the second part against all alleged infringements of letters patent granted to other parties and will promptly defend the letter-patent held and owned by said Siemens-Lungren Company and protect the parties of the second part from infringement by other parties, in the exclusive and unrestrained use of the rights, franchises and privileges hereby conveyed providing they are duly notified and given exclusive control of any litigation which may ensue.

That the said Siemens-Lungren Gas Illuminating Co. as a part of the agreement will give to said parties of the second part a good and sufficient bond in the sum of five thousand ($5,000) dollars conditioned upon the prompt and faithful execution of all the conditions imposed by the terms of this agreement.

183 Second. That the parties of the second part, their successors and assigns will within ten days after the formal execution of this contract pay to the recognized agent of the Siemens-Lungren Gas Illuminating Company the consideration set forth in this contract and called for by the proposition heretofore made by L. J. Wolf, sec't'y under date of November 7, 1887.

That they will exercise all due and proper diligence and energy in securing the introduction of the lamps, burners and appliances of said Siemens-Lungren Co. into public use in the territory named, preference however to be first given to their introduction in the county of Hamilton, and that for all lamps ordered they will pay according to the rates hereinbefore mentioned in cash upon the 10th day of each month for all goods delivered during the preceding month, and in the event of their failure so to do the Siemens-Lungren Gas Illuminating Company shall have the right to solicit purchases and fill orders with- the territory hereby covered.

In witness whereof, the said Siemens-Lungren Gas Illuminating Company by its secretary L. J. Wolf, who is hereby fully authorized by power of attorney to execute the same on behalf of the president of said company, affixes *his* signature and the seal of said company

this 9th day of November, 1887, and the parties of the second part, each for himself signs the same and attaches his seal thereto.

L. J. WOLF, *Sec'y.*
JOSEPH WOLF, *Pres't.*
A. HICKENLOOPER.
E. O. ESHELBY.
D. L. BILLINGHEIMER.
SAM'L W. TROST.
M. KROHN.
CHAS. FLEISCHMANN.
J. A. S. GRAY.
JAMES ALLISON.
FRED. H. ALMS.
C. B. WING.

184 PLAINTIFF'S EX. "K." W. K. Lowrey, Commissioner.

E. O. Eshelby.

CINCINNATI, *February 4th*, 1888.

The Siemens-Lungren Gas Illuminating Company, 77 & 79 Dearborn St., Chicago, Ill.

GENTLEMEN: I am in receipt of your statement of your account, amounting to $2,060.00, with a credit of $13.15. We were not aware of any lamps being sold in the territory mentioned, and would prefer leaving that for discussion to the future. The shipment of Jan. 26th has not as yet been received. With the understanding that any breakage, imperfect lamps, or shortage will be rectified and credited upon the next statement, you may draw sight drafts upon the 10th inst., as per terms of contract, for the amount of your statement, namely, $2,060.00.

I am, very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.,
Per E. O. ESHELBY, *President.*

185 PLAINTIFF'S EXHIBIT L. W. K. Lowrey, Commissioner.

E. O. Eshelby.

CINCINNATI, *March 6th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ill.

GENTLEMEN: In answer to your communication of March 3rd, containing enclosures from the Middletown Gas Co., I desire to say that we have had this under consideration for some time and we must respectfully ask you, if you have not already done so, notify the Middletown Gas Co. or any other person or persons within the territory that we have purchased from you, that we possess the ex-

clusive and sole right for such territory, and that they must transact their business with us.

Very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY,
Per E. O. ESHELBY, *Pres't.*

186 EXHIBIT "M." W. K. Lowrey, Commissioner.

E. O. Eshelby.

CINCINNATI, *March 7th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ill.

GENTLEMEN: Miss Folger reports to me this morning that in the last lot of 12 and 16 feet lamps received one 16 and two 12 feet lamps were damaged and broken. Do you desire to have us return these to you, deducting the same from the amount of your statement, or will you replace them in the next shipment? We have furnished to Mr. Billi-gheimer 23 lamps, which he stated you would allow us the credit of $3 for each lamp or a total of $69; this will make a total due you on the 10th, deducting for the damaged lamps and amount credited to Billi-gheimer, of $4,197.00.

As to the credit upon the Middletown lamps, as stated before, we wise to leave that for future consideration. You may send us at once 50 12-ft. lamps.

Very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLU. CO.
E. O. ESHELBY, *President.*

187 EXHIBIT "N." William K. Lowrey, Com.

MARCH 3.

Middletown Gas Company, Middletown, Ohio.

GENTLEMEN: We are in receipt of your favor of the 1st inst. and despatch of last night. In reply would say that, as explained to you on Feb. 20th, the Siemens-Lungren Gas Illuminating Co. of Cincinnati, who control your district in Ohio, wrote to us that they would prefer filling orders for their own district themselves, and we have accordingly transferred the order you send to them, with the request that they write you at once in reference to it.

In regard to the account we have against you, we will accept your proposition to allow 2 per cent. discount at present and will draw on you on Monday for the amount less 2 per cent. Please protect our draft, and oblige,

Very truly yours,

THE SIEMENS-LUNGREN GAS ILLUMINATING CO.
L. J. WOLF, *Sec'y.*

188 PLAINTIFF'S EXHIBIT "O." W. K. Lowrey, Commissioner.

MARCH 12, '88.

Mr. G. N. Clapp, sec't'y Middletown Gas Company, Middletown, Ohio.

DEAR SIR: We are in receipt of your favor of the 10th inst. and in reply would say that we are sorry the Cincinnati company has not given your order the attention which it demanded. When we wrote to you some time ago that we had not sold the territory in which Middletown is situated we were in error and did not know what county you were located in; but the Cin'ti people who bought that territory have strictly prohibited us from filling any of their orders. We hope that you will reconsider your decision about countermanding the order.

Very truly yours,

THE SIEMENS–LUNGREN GAS ILLUMINATING CO.
L. J. WOLF, *Sec'y.*

189 PLAINTIFF'S EXHIBIT "P." William K. Lowrey, Commissioner.

MARCH 28.

Middletown Gas Company, Middletown, Ohio.

GENTLEMEN: Your postal of the 24th inst. to hand and noted. In reply would say we had disposed of the territory in which your town is located previous to any transaction or business with your company, and when we shipped your first lot of lamps we were not aware that Middletown was included in that territory. We were notified by the Cin'ti company not to ship any lamps to your city, as they preferred to fill orders for their own territory, and we must therefore decline to interfere.

Very truly yours,

THE SIEMENS–LUNGREN GAS ILLUMINATING CO.
JOSEPH WOLF, *Pres't.*

190 PLAINTIFF'S EXHIBIT "Q." W. K. Lowery, Commissioner.

160 STATE ST., *July 3rd*, 1888.

The Cincinnati Siemens-Lungren Gas Illuminating Co., Cincinnati, O.

GENTLEMEN: The territory formerly owned by the Siemens-Lungren Gas Illuminating Company has been acquired by the Western Siemens-Lungren Company, and the new company will assume your contract exactly as at present existing with the old company, with this additional fact in your favor, viz., the parent or Philadelphia Co. furnishe- you with a contract, also stipulating that for the life of the patents your company shall have exclusive control of the territory you purchased upon the terms specified in your existing

contract. This will make your contract stronger than heretofore, as you will have the direct protection of the parent company as well as of the Western company. We forward papers for execution which will fully explain themselves. Please execute one copy of each and return to us, retaining the other copy of each for yourselves.

Very truly yours,
THE WESTERN SIEMENS-LUNGREN CO.,
160 *State Street.*
L. J. WOLF, *President.*

You will notice that a copy of original contract accompanies contract with Phila. company; this is to be left attached. Please send to us and we will forward to Phila. for signature.

191 PLAINTIFF'S EXHIBIT "R." W. K. Lowrey, Commissioner.

The Siemens-Lungren Gas Illuminating Company, 159 Plum street.

Address all correspondence to the company.

CINCINNATI, *July 9th.*

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ill.

GENTLEMEN: I am in receipt of your communication of the 3rd inst., and owing to my duties as sec't'y of the exposition which opened on the 4th, have been unable to reply sooner. In answer thereto I wish to say that the majority of the board are absent from the city—Mr. Fleischmann in the Catskill, Mr. Wing at Old Point Comfort, and Mr. Skiff in Boston. The very first opportunity I have for securing a quorum I shall lay the matter before them and advise you of their action.

Very respectfully, E. O. ESHELBY, *Pres't.*

192 PLAINTIFF'S EXHIBIT "S." W. K. Lowery, Commissioner.

The Siemens-Lungren Gas Illuminating Co., 159 Plum street.

CINCINNATI, *July 16th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ill.

GENTLEMEN: The electric-light lamp at the exposition has proved inadequate to supply the wants of the exhibitors; in addition, it has proved unsatisfactory to certain exhibitors by its going out, and they are unable at this late day to increase their capacity in time to be of any service, and I have an order from them for a large number of our lamps, provided I can supply the immediately. Will you therefore ship at the earliest possible date one hundred 16-ft. lamps, two hundred 12-ft. lamps, and fifty 8-ft. lamps; also another gross of the ceiling plates?

It is of vital importance that I should have the gross of ceiling

plates ordered some two weeks ago at once, and not less than about one-half of the number of lamps ordered inside of a week and the balance as soon thereafter as possible.

Very respectfully, E. O. ESHELBY, *Pres't.*

193 PLAINTIFF'S EXHIBIT "T." W. K. Lowery, Commissioner.

The Western Siemens-Lungren Co., successor to the Siemens-Lungren Gas Illuminating Co., 75, 77, 79, & 81 Dearborn St.

Address all correspondence to the company.

CHICAGO, *July* 17, 188[illegible]

Page 286, copy book.

Mr. E. O. Eshelby, president the Cin'ti S. L. G. Ill. Co., 158 Plum St., Cincinnati, O.

DEAR SIR: Yours — July 16th to the Siemens-Lungren Gas Ill'g Co. was handed to our company, as the former company has practically ceased doing business and has no lamps on hand. We shall therefore treat the order as though it had been sent directly to us, in harmony with the notice previously sent you, that the undersigned has control of the territory in which you are operating. We — scarcely prepared on such short notice to fill so large an order, but will do our best. We have started at packing the 100 16-ft. lamps and hope to have them ready within a week. We have wired to Phila. company, asking whether they can ship 200 12-ft. and 50 8-ft. from there at once, as we have not enough of either of that size to fill your order. It is our opinion that we had better ship *from* express from here and from Phila. and endeavor to make some special rates, and will so ship unless in the meantime you advise to the contrary by wire. We will advise you by wire of the answer from Phila. Co., and presume you want us to ship 100 16-ft., even though delay is necessary on remainder of the order, east. If there is any portion of this arrangement with which you are not satisfied, advise by wire. The order will be filled without in any

194 way affect- your existing contract. We will await the action of your board in reference to signature, as per your recent letter. The 1st gross of ceiling plates were shipped July 11th, and we will send a tracer after them to-morrow.

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.

We sent you bill for the ceiling plates at the time and enclose duplicate bill.

195 PLAINTIFF'S EXHIBIT "U." W. K. Lowrey, Commissioner.

Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sendor of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amounts of tolls paid thereon nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message and is delivered by request of the sender under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Number.	Sent by—	Rec'd by—	Check.
78 ch.	W.	D.	32 p'd.

100 at

Received at Radmer house 7, 20, 188–.

Dated CINCINNATI, O., —— 20.

To Mr. L. J. Wolf, 60 State:

It is of vital importance to get lamps for exposition at once. Take whatever action you deem best about freight or express to insure immediate delivery. If delayed will lose opportunity of placing.

E. O. ESHELBY, *Pres't.*

196 PLAINTIFF'S EXHIBIT "V." W. K. Lowrey, Commissioner.

The Western Siemens-Lungren Co., successor to the Siemens-Lungren Gas Illuminating Co., 75, 77, 79, & 81 Dearborn St.

Address all correspondence to the company.

CHICAGO, *July 19th*, 1883.

Telegrams.

Mr. E. O. Eshelby, president the Cin'ti S. L. G. Ill. Co., 158 Plum St., Cincinnati, O.:

Philadelphia company says it can ship twelve and eight feet ten days from receipt of order. We can ship 16-foot within a few days. Is this and our letter of 17th satisfactory? If so, wire answer and we will wire order to Philadelphia and prepare shipment from here. Advise us a-out freight or express shipment.

THE WESTERN SIEMENS-LUNGREN CO.

Page 314, copy book.

PLAINTIFF'S EXHIBIT "V." W. K. Lowrey, Commissioner.

JULY 21ST, 1888.

The Cin'ti S. L. G. Ill. Co., 158 Plum St., Cincinnati, O.:

Fifty sixteen feet leave here by Wells-Fargo express to-day; fifty next Monday; balance of order from Philadelphia by express in a few days.

THE WESTERN SIEMENS-LUNGREN CO.

197 PLAINTIFF'S EXHIBIT W. W. K. Lowrey, Commissioner.

The Western Siemens-Lungren Company, successor to the Siemens-Lungren Gas Illuminating Co., 75, 77, 79, and 81 Dearborn St.

Address all correspondence to the company.

CHICAGO, *July 19th*, 1888.

Page 318, copy book.

CHICAGO, *July 21st*, 1888.

The Cin'ti S. L. G. Ill. Co., Cin'ti, O.—Mr. E. O. Eshelby, president.

DEAR SIR: Your telegram received; have just wired you "fifty sixteen feet leave here by Wells-Fargo to-day; fifty next Monday; balance of order from factory by express in few days."

This we herewith confirm. We have been given a rate of $1.00 per hundred pounds to Cincinnati, both for shipment from here and for shipment from Philadelphia. This is an exceedingly low rate and will undoubtedly please you better than to have had them come by freight at something less.

We have just received word from our shipping clerk that 52 lamps were sent you from here to-day, together with the following: 100 16-ft. flame plates; 100 16-ft. burners; 204 16-ft. globes; 192
198 12-ft. globes; 50 8-ft. globes. On Monday will send 48 16-ft. lamps without globes, burners on flame plates, and that will make the 100 16-ft. lamps complete.

The Philadelphia company will ship but one globe with each lamp, and that, together with the 12 and 8 ft. globes sent you to-day from here, will make the lamps from Eastern company complete.

Enclosed please find bill for to-day's shipment and also duplicate express receipts.

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.

199 PLAINTIFF'S EXHIBIT "X." W. K. Lowrey, Commissioner.

The Cincinnati Siemens-Lungren Gas Illuminating Co.

Address all correspondence to the company.

CINCINNATI, *July* 21*st*, 1888.

The Siemens-Lungren Gas Ill. Co., Chicago.

GENTS: We have a number of lamps on hand from which the whitening has fallen and which need rewhitening before being *being* again placed in position.

Would you kindly send us a receipt and method of applying the whitening to the lamps? By doing so you will greatly oblige,

Yours very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.
CHAS. LUDLAW, *Mg'r.*

200 PLAINTIFF'S EXHIBIT "Y." W. K. Lowrey, Commissioner.

Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on condition limiting its liability, which have been assented to by the sendor of the following message.

Errors can be guarded against by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amounts of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message, and is delivered by request of the sender under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Number.	Sent by—	Rec'd by—	Check.
226 ch.	Sd.	D.	P'd.

Received at Palmer house 4.40 p. —, 7, 31, 188–.
Dated Cincinnati, O., 31.

To L. J. Wolf, 160 State St.:

Please send us at once three gross ceiling plates.

E. O. ESHELBY, *Presi.*

201 PLAINTIFF'S EXHIBIT "Z."

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street.

Address all correspondence to the company.

CINCINNATI, *Aug.* 7, '8.

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ill.

GENTLEMEN: At a meeting of the board of directors of the Cincinnati Siemens-Lungren Gas Illuminating Co., held August 5th, I presented our communication in regard to our disposal to the Western Siemens-Lungren Co. of your franchises and contracts, desiring the assent of this company, and after some discussion of the subject the following resolution was adopted unanimously:

Resolved, That we can see no legitimate object, purpose, or business advantage to be gained by assenting to such transfer or in any manner modifying our present existing contract with the Siemens-Lungren Gas Illuminating Co. of Chicago, and that the presiden- of this company be directed to notify the president of said company that this company declines to approve or in any manner become a party to any such transfer or assignment.

Very respectfully, E. O. ESHELBY, *Pres't.*

202 PLAINTIFF'S EXHIBIT No. 1. W. K. Lowrey, Commissioner.

CHICAGO, *Aug. 8th*, '88.

(It was agreed by counsel that the stenographer copy should be introduced as of full force and effect as original, subject to objections of defendant's counsel, as noted in deposition.

W. K. LOWREY,
Commissioner.)

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum St., Cincinnati, O.

GENTLEMEN: In reply to yours of Aug. 7th would say that, since you decline for the reason stated in your letter "to become a party to any such transfer or assignment," there is nothing for us to do but to allow the contracts at present existing between you and ourselves to remain in force. In this connection we would say the request was made simply to facilitate matters and the better to secure your company. As you or members of your company are aware, members of our company were at one time interested in the capital stock of the Phila. Co., and this stock has been sold to persons in Phila. who now with their former holdings control the Phila. Co. A portion of the negotiations in the transfer of the stock consisted of an arrangement that would fully and completely bind the Phila. Co. for all time to respect your subcontracts, together with all other subcontracts we had formed. This was done out of

a sense of moral obligation to the people to whom we sold territory, as to you, aside entirely from any legal aspect of the matter.

We have no interest to protect aside from a moral desire
203 to place you in an absolutely secure position by a guarantee from the Philadelphia Co. so that never a question can arise as to your right of possession. This concession, because we wanted it, and for no other reason, was at the time very difficult to obtain from the Phila Co.

If, now, you do not choose to avail yourselves of it, it is a matter over which you have control. We had no doubt but you would gladly do so when the opportunity was given, as it made your contract manifestly better. From our knowledge of the men in control of the Phila. Co., we know it will be impossible to obtain an extension of the time beyond the date agreed upon, viz., Oct. 1st, for the ratification by them of the contract. And we believe you will still see the folly, if you will pardon the word, of failing to avail yourselves of the opportunity to strengthen your contract on no other ground, seemingly, than because it was suggested and arranged by us.

However, if you do not decide to do so, as stated earlier in our letter, our contract remains as it is.

We would suggest that you examine the question more fully and carefully, and you cannot help seeing that we have nothing to gain and that we have acted only in your interest, and then please advise us if you have decided differently in reference to the matter.

Very truly yours, THE SIEMENS-LUNGREN GAS ILLUMINATING CO.,
Per I. D.

204 PLAINTIFF'S EXHIBIT No. 2. W. K. Lowrey, Commissioner.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street.

Address all correspondence to the company.

CINCINNATI, *Aug. 9th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 160 State street, Chicago, Ill.

GENTLEMEN: Your statement furnished to us for $6,931.00 is not in accordance with the price of our contract, which we respectfully refer you to. You charge us for 8-ft. lamps $18.00 and for 12-ft. lamps $19.50. Our contract calles for $17.50 and $19.00 respectively. Until correction is made we cannot pay draft.

Very respectfully, E. O. ESHELBY, *Pres't.*

205 PLAINTIFF'S EXHIBIT No. 3. W. K. Lowrey, Commissioner.

(It was agreed by counsel that the stenographer's copy may be introduced as of the full force and effect as the original, subject to the objections of defendant's counsel as noted in the deposition.

W. K. LOWREY.)

160 STATE ST., *Aug. 14th*, '8.

The Cincinnati Siemens-Lungren Gas Illuminating Co., Cincinnati, O., 158 Plum St., Mr. E. O. Eshelby, pres't.

GENTLEMEN: We have been informed that our draft on you for $6,806.00 was returned unpaid because of no attention paid by your Co. to the bank notice.

Will you please to inform us why the draft was not honored? Your early reply solicited.

Very truly yours, L. J. WOLF, *Pres.*

206 PLAINTIFF'S EXHIBIT No. 4. W. K. Lowrey, Commissioner.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street.

Address all correspondence to the company.

CINCINNATI, *Aug. 15th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 160 State street, Chicago, Ill.

GENTLEMEN: In reply to yours of August 14th, I have to say that the rendition by you of an incorrect bill, coupled with other incidental matters, has lead to more careful consideration of our mutual contract privileges and obligations, during which it has apparently been developed that we have not in all respects been the recipient of the contract *of the contract* advantages to which we are justly entitled. The writer is now extremely busy with other business engagements which cannot be entirely ignored and which will, to some extent, interfere with the mature and final consideration of the questions involved, but which will receive his earliest practicable consideration. It is proper, however, to add that, if our surmises prove correct, no drafts will be honored until these questions are satisfactorily adjusted.

Very respectfully, E. O. ESHELBY, *President.*

207 PLAINTIFF'S EXHIBIT No. 5. W. K. Lowrey, Commissioner.

The Siemens-Lungren Gas Illuminating Co.

(It was agreed by counsel that the stenographer's copy might be introduced as of the full force and effect as the original, subject to the objections of defendant's counsel as noted in *defendant's counsel as noted in* deposition.

W. K. LOWREY, *Com.*)

CHICAGO, *Aug.* 17, '88.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street, Cincinnati, Ohio.

GENTLEMEN: Replying to yours Aug. 15th, would say you can have received no letter from this company written Aug. 14th, as no

letter was sent you by this company on that day nor was any incorrect bill rendered you by this company, nor do you owe this company any sum which would entitle us to making a draft on you. We would also say that we do not understand your allusions to not having been "the recipient in all respects of the contract advantages," etc., but we shall be pleased to learn in what particular you feel you have been deprived of any advantages, and we can then answer you definitely.

We will find us prompt to acknowledge and correct any error, if any exists, and fully capable financially to adjust any possible fancied or real differences. We would also say that your recent purchase of mdse. from the Western Siemens-Lungren Company was made without prejudice to you in any degree in the
208 rights you have under the contract with us, and your contract remains in force with us exactly as when executed. It is optional with you to execute the contract with the Western Siemens-Lungren Co. We are certain that no differences exist that cannot be happily adjusted to our mutual satisfaction. Kindly oblige us with a statement of your grievance at your earliest convenience, and oblige,

Yours truly, THE SIEMENS-LUNGREN GAS ILLUMINATING CO.,
Per I. D. L.

209 PLAINTIFF'S EXHIBIT No. 6. W. K. Lowrey, Com.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street.

Address all correspondence to the company.

CINCINNATI, *Aug.* 23, '88.

The Siemens-Lungren Gas Illuminating Co., Chicago, Ill.

GENTLEMEN: We have the honor to acknowledge the receipt of your favor of 17th inst., and note your statement that you did not write us on the 14th, have not as yet sent us any bill for goods delivered, and finally that we do not owe you any sum which would entitle you to draw on us.

We were certainly under a different impression, based upon the fact that we have a contract with you, under which we have ordered and received goods from you, and have never had any business transactions of any character or kind with any other firm or corporation in Chicago.

We do not know what you mean by a reference to some alleged purchase by us, or by you for us, of goods from "the Western Siemens-Lungren Co." We never made or authorized any such purchase and know nothing about it or any such alleged company.

It is hardly necessary for us to be more specific in our reasons for declining to honor your drafts until you unwind yourselves from the complications in which you are apparently involved and make your status much plainer than it now appears to be.

Very respectfully, E. O. ESHELBY, *Pres't.*

210 PLAINTIFF'S EXHIBIT No. 9. W. K. Lowrey, Commissioner.

It was agreed by counsel that the stenographer's copy might be introduced as of the same force and effect as the original, subject to the objections of defendant's counsel as noted in the deposition.

W. K. LOWREY,
Commissioner.

CHICAGO, *Sept. 11th*, 1888.

The Cincinnati S. L. G. Ill. Co, Cinti., O., Mr. E. O. Eshelby, pres't.

DEAR SIR: Referring to the conversation between yourself and the writer, in which you claimed as follows:

1st. That certain patents pertaining to the lamps were allowed to lapse.

2nd. That a reduction in price on goods for which you have paid the Siemens-Lungren Gas Ill. Co. is due you as well as a reduction in price on goods recently shipped you by this company.

3rd. That your territory has been invaded and a considerable number of lamps sold, more especially in Dayton, O.

4th. That you have not had the most approved form of lamps delivered you in most instances—

In reply would say that although we fail to see how the first point in question, even if true, as stated by you, could at all effect the settlement between your company and ourselves, still we are pleased to be in a position to state by reason of information obtained from the Siemens-Lungren Company of Phila. that there is no foundation for what has been claimed in reference to any patents owned by that company. As to invasion of territory, would say that a careful examination of the books of the Siemens-Lungren Gas Ill. Co. as well as of the Western Siemens-Lungren Co.

211 proves that in no instances had either Co. sold any goods in your territory since you have acquired it, excepting the sales to the Middletown Gas Co. by the Siemens-Lungren Gas Ill. Co., of which you were informed involuntary by the latter company at the time, a revision of the figures given you at that time, and shows an error to have been made. The Middletown Gas Co. has bought in all nine (9) lamps, seven of which were sold it since you acquired the territory, and as profit on these sales there is due your company $31.50. As to approved form of lamp, would say in reference to the long-lever bye-pass cork, which you stated as your objection to lamps in your possession, that we will furnish the long-lever bye-passes in lots of 100 or 200 at a time without charge, provided you return an equal number of the bye-passes for which the long lever are to be substituted.

In this connection would say that the Siemens-Lungren Co. of Phila., even without our intervention, would be glad to do so and is doing so daily with all who desire it. The long-lever bye pass is a recent innovation. We also understand that you have about sixty (60); but let us say 100 or less to make sure to cover everything to your satisfaction. Lamps that you do not think at all

suitable—of this we will speak later in this letter. As to reduction, without endeavoring at all to discuss the merit of your claim, will say that for the purpose of an immediate settlement and a remittance by you of the balance which will then be due us we will allow you to deduct from the bills rendered you as follows:

$1,600	allowance in price.
1,900	for 100 lamps.
13 50	for lamps sold by S. L. G. Ill. Co. to Middletown.
$3,531 50	in all.

212 This offer is made entirely as a compromise offer and for the purpose of an immediate settlement, and with the understanding that you obligate yourselves to ship to us within 30 days the 100 lamps allowed for or for each lamp less returned than the 100 you agree to remit $19.00 within 30 days. Since our offer is made as a compromise and for the purpose of effecting a settlement, we reserve the right to withdraw it if not accepted immediately.

We enclose you bill for ceiling plates shipped you which had been overlooked.

Awaiting your reply promptly as agreed upon verbally between yourself and the writer,

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.

213 PLAINTIFF'S EXHIBIT NO. 10. W. K. Lowrey, Commissioner.

It was agreed by counsel that the stenographer's copy might be introduced as of the same force and effect as the original, subject to the objections of defendant's counsel as noted in the deposition.

W. K. LOWREY,
Commissioner.

Telegram.

CHICAGO, *Sept. 14th,* 1888.

The Cincinnati Siemens-Lungren G. Ill. Co., 158 Plum St., Cin'ti, O.

Remittance must arrive to-morrow or compromise offer will be withdrawn.

THE WESTERN SIEMENS-LUNGREN CO.

214 PLAINTIFF'S EXHIBIT NO. 11.

It was agreed by counsel that the stenographer's copy might be introduced as of the same force and effect as the original, subject to the objections of defendant's counsel as noted in the deposition.

W. K. LOWREY,
Commissioner.

CHICAGO, *Sept. 18th*, 1888.

The Cin'ti S. L. G. Ill. Co., Cin'ti, O., Mr. E. O. Eshelby, pres't.

DEAR SIR: Yours 13th at hand; in reply would say the position you assume that you are not aware of our existence and have had no dealings with us is ridiculous and untenable. You have at various times and in various ways had notice of our existence, but more noticeably and particularly just before we began shipping you goods, and even more particularly when we billed you the goods, which you accepted and appropriated to your use. It is possible that your company has devised a method of accepting "goods unofficially" to await official recognitions of the shipper, but the writer must admit that such a method, if possible, is a decided novelty and very new. However, when the writer was at your city he was led by you personally to believe that no such discussion or controversy as stated in yours of the 13th could possibly ensue. You stated very distinctly that you and your company wanted the four points which you submitted acted upon, and you would then call a meeting for the consideration of your proposition, but you as distinctly stated that the question of dealing with one or another company made not the slightest difference. All you desired was a satis-
215 factory settlement of the four grievances submitted, and you furthermore stated that if upon any one point of these four our proposition was not correct or satisfactory you would at once inform us to what extent and in what manner. The writer asked you if there would be any question of a different nature raised, and said he was ready to answer any questions, but you stated there was nothing of importance beyond the four points in question. In consequence he is somewhat astonished to find the change of front and another question given so much prominence in your letter. As to our claims against your company, before proceeding further in this letter the writer desires to say the concessions recently offered were for the purpose of affecting an amicable settlement and compromise and are open for your consideration and acceptance until the 24th of this month.

If you do not decide by that time to accept the terms offered we reserve the right to withdraw the *proportion* and to endeavor to effect a collection of the entire amount of our claim. As to the papers submitted to Gen'l Hickenlooper, we know of no reason in the world why we should decline giving you a "summary," though the writer was fully prepared to submit them for your examination when in Cincinnati had you evinced the slightest disposition to do so or had you not assured him that the question is not of the slightest comparative interest. We deny that these papers in any degree affect the obligation of your company, but for the merchandise shipped you.

A summary of them is as follows:

The original contract for Ohio between the Siemens-Lungren Gas Ill. Co. and the Ohio company, under which you hold your rights—this contract was a forfeitable one, and it happened that the Phila. Co. saw fit to enforce the forfeit clause when the opportunity

finally came. A contract was subsequently *ended* in-
215½ between the Phila. Co. and the Western Siemens-Lungren Co., giving to the latter the control of eight Western States, including the State of Ohio. It was the desire of all these companies, viz., the Siemens-Lungren Gas Co. of Phila., the Siemens-Lungren Gas Illuminating Co., and the Siemens-Lungren Co., that your company should be left in possession of the three counties in which you are operating. In consequence a contract was entered into between the Phila. Co. and the Western Co. by which the Phila. Co. guarantees to protect your company in the exclusive control of your territory for the life of your patents, under which it is operating. The Philadelphia Co. also agreed upon a request made by this company to submit through us a contract to be signed between your company and the Philadelphia Co., which, though similar in effect to the guarantee already existing between the Phila. Co. and ourselves, could only result in making your position still more secure by reason of a contract between yourselves and the parent Co. We have only now to add that if you desire to avail yourself of the opportunity we will be pleased to assume the full contract obligations evidenced by your contract with the Siemens-Lungren Gas. Ill. Co., and will obtain the signature of the Philadelphia or parent Co. to the document submitted you some time ago, by means of which you will be guaranteed absolutely possession of the three counties in Ohio. We also again wish to add that all the propositions in reference to contracts are made regardless of and without in any manner affecting or pertaining to your indebtedness. Ans. Awaiting your prompt acknowledgment and reply,

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.

216 PLAINTIFF'S EXHIBIT NO. 7. W. K. Lowrey, Commissioner.

It was agreed by counsel that the stenographer's copy be introduced as of the same force and effect as the original, subject to the objections of defendant's counsel as noted in deposition.

W. K. LOWREY,
Commissioner.

The Western Siemens-Lungren Co., successor to —— ——, 160 State St.

AUG. 17, '8.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street, Cincinnati, O.

GENTLEMEN: Yours Aug. 5th to the Siemens-Lungren Gas Illuminating Co. was handed to us for reply to such portion as referred to transactions between you and us.

We understand that for the present you decline to honor any drafts for our account against your company.

May we ask you to prepare at as early a day as possible—say in

one week—for payment of account? This will probably give you ample time and will be an accommodation to us. We will write in one week asking your permission to draw.

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.,
160 *State St.*

L. J. WOLF, *President.*

217 PLAINTIFF'S EXHIBIT No. 12. W. K. Lowrey, Commissioner.

It was agreed by counsel that the stenographer's copy might be introduced as of the same force and effect as the original, subject to the objections of defendant's counsel as noted in deposition.

W. K. LOWREY,
Commissioner.

CHICAGO, *Oct.* 11, 1888.

The Cin'ti S. L. G. Ill. Co., 158 Plum St., Cincinnati, O., Mr. E. O. Eshelby, pres't.

DEAR SIR: Replying to yours Sept. 25th, the writer would say you are undoubtedly indebted to the Western Siemens-Lungren Co. for goods shipped you by that company, billed you by that company, and accepted by you after you had received notice that the goods belonged to that company. The writer happens to represent that company as pres't of the corporation, and also happens to represent the Siemens-Lungren Gas Illuminating Co. as its secretary and in reference to the "differences to be adjusted and questions to be stated," which the latter would suggest the propriety of a statement in full from you as to their extent and purport, and, without doubt, all questions and differences can be settled mutually satisfactorily.

I will also state that the Western Siemens-Lungren Company is disposed to wait a reasonable time for the "differences to be adjusted and questions to be stated" between your company and the Siemens-Lungren Gas Illuminating Co. before endeavoring to enforce a collection of its claim against your company, provided a disposition is evinced on the part of your company at once to meet
218 the Siemens-Lungren Gas Illuminating Co. in an endeavor in that direction—that is to say, by definitely and fully stating to the latter company all differences, in your opinion, existing and what, if any, monetary damages or credits or differences you claim. This you may do if you choose without in any way alluding to the shipment of goods made you by the Western Siemens-Lungren Company and without prejudice to you or to the Western Siemens-Lungren Co. for the amount of your indebtedness to the latter company. In justice to the companies I represent I am compelled to state that if no effort on your part is evinced towards formulating, forwarding such a statement as is requested, I shall be forced to institute proceeding- looking to the enforcement of your

payment of the amount due the Western Siemens-Lungren Company.

Very truly yours,

THE WESTERN SIEMENS-LUNGREN CO.

219 United States Circuit Court, Southern District of Ohio, Western Division.

WESTERN SIEMENS-LUNGREN COMPANY
vs.
CINCINNATI SIEMENS-LUNGREN COMPANY. } = 4226.

COMMONWEALTH OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

I, T. A. Fenstermaker, a notary public for the Commonwealth of Pennsylvania, residing in the city and county of Philadelphia, duly commissioned and qualified, do hereby certify that the within-named Emanuel Stein and Henry A. Brognard were by me first severally sworn or affirmed according to law to testify the truth, the whole truth, and nothing but the truth, and that the depositions hereto attached (the signature thereto having been waived by counsel) were reduced to writing by myself in the presence of several witnesses aforesaid.

I further certify that the depositions were taken at the office of the Siemens-Lingran Co., 22nd and Washington Ave., in the city of Philadelphia, to which place, by consent of counsel, the taking of said depositions had been adjourned, and that I am not counsel or attorney or relative or either party or otherwise interested in the event of said suit.

I further certify that the witnesses and each of them live more than a 100 miles from the place of trial.

In testimony whereof I have hereunto set my hand and official seal this first day of Feb., A. D. 1890.

T. A. FENSTERMAKER, [SEAL.]
Notary Public.

220 United States Circuit Court, Southern District of Ohio.

THE WESTERN SIEMENS-LUNGRAN COMPANY, Plaintiff,
vs.
THE CINCINNATI SIEMENS-LUNGRAN CO., Defendant. } = 4226.

The above-named plaintiff will take notice that on Saturday, the 1st day of February, A. D. 1890, the defendant above named will take the depositions of E. Stein and sundry witnesses to be used as evidence in the trial of the above cause at the law office of Samuel Wagner, Jr., No. 251 South 4th St., city of Philadelphia, in the county of Philadelphia and State of Pennsylvania, between the hours of 3 o'clock a. m. and 6 o'clock p. m. of said day, and that

the taking of the said depositions will be adjourned from day to day between the same hours until they are completed.

EDWARD DIENST,
Attorney for Defendant.

Counsel for respective parties agree that the giving of the names of the several witnesses to be examined in the above case at the said time and place is hereby waived, and said counsel consent that the depositions of such witnesses as may be produced at said time and place may be taken.

And it is further agreed that these depositions may be taken before a disinterested stenographer and reduced to writing by him and signed by the several witnesses after the same have been so reduced to writing, and all exceptions or objections to the said depositions by reason of the failure to specify the names of each
221 witness in this notice and also by reason of the same being taken and reduced *by* writing by said stenographer are hereby expressly waived.

Service of the above notice is acknowledged and proof of the official character of the officer before whom the said depositions may be taken is, by agreement, waived; also all exceptions as to time.

Done this 27th day of January, A. D. 1890.

KRAMER AND KRAMER,
Att'ys for Plaintiff.

222 Depositions of sundry witnesses taken in case # 4226, pending in the United States circuit court for the southern district of Ohio, western division, before T. A. Fensterinaker, a notary public for the Commonwealth of Pennsylvania, residing in the city and county of Philadelphia, pursuant to the notice and agreement of counsel of record of the parties to said case hereto attached, and at the time specified in the notice and at the place to which, by consent of counsel, the taking of said depositions was adjourned, The Western Siemens-Lungren Co. being the plaintiff in said case and The Cincinnati-Siemens Lungren Co. being the defendant, Lowrey Jackson, Esq., appearing for the plaintiff and Edward Dienst, Esq., appearing for the defendant.

EMANUEL STEIN, being duly sworn, testified as follows on examination:

By Mr. DIENST:

Q. State your name, age, residence, and occupation.

A. My name is Emanuel Stein; age, 39; president of the Siemens-Lungren Company; residence, Philadelphia.

Q. You have always been president of the Siemens-Lungren Co.?

A. Since its organization.

Q. (Paper shown witness.) Please examine this Exhibit 1 of a former deposition and state whether you recognize that as the contract between your company and Joseph Wolf.

A. Yes, sir.

Q. State, if you can, at what prices the lamps and fixtures provided for in this contract were furnished to Joseph Wolf and
223 to his assignees.

A. I cannot answer that question without referring to the books of the company, and I would prefer to have Mr. Brognard, our secretary, who has charge of such matters, give the information you desire.

Q. Do you know what discounts were allowed upon sales made under this contract to Mr. Wolf, and also under the assignment made by him to the first Chicago company?

A. I do not remember the amount.

Q. Do you know what discounts were announced to the trade upon this identical class of goods provided for under the contract since the entering into of the contract between Mr. Wolf and the syndicate in Cincinnati, dated November 9, 1887, and which discounts you furnished the trade with?

Objected to by Mr. Jackson. Sustained.

A. Since the date of the contract referred to and up to the present date our scale of discounts have varied from, say, 25% from the list to 50% from the list.

Q. Can you tell at what dates and from what time those discounts were announced?

Objected to. Sustained.

A. I have not the date in my mind.

Q. Mr. Brognard will know that?

A. I think so.

Q. Can you state whether or not you have sold lamps in question or any fixtures provided for under the contract to either Middletown, Dayton, or Hamilton, Ohio, since entering into the contract between yourselves; and if you have sold any, can you state the amounts sold at the various places?

A. I cannot give an intelligent reply to that question; *it*
224 *would to that question;* it would have to be referred to Mr. Brognard.

Q. Will you state whether or not at any time since this contract had been entered into you had occasion to visit Cincinnati and make an examination of lamps furnished to the Cincinnati company by the Chicago company; and, if so, please state the result of that examination.

A. I have made several visits to Cincinnati since the date of the contract, November 9, 1887; and during one of my visits my attention was called to some lamps which were in the possession of the Cincinnati Co.; that upon examination we discovered were lamps not manufactured by our company, but were apparently made by some one in imitation of the lamps we were supplying. I so informed Mr. Eshelby.

Q. Did you see the lamps in question in use; and, if so, what was the character of the service which they gave?

A. I do not think I saw the lamps in use. Those I saw were at the office of that company.

Q. Do you know the number of them?

A. Not positively; only as stated to me.

Q. State whether or not you directed the Cincinnati Co. to retire from use all that class of lamps which you on investigation denounced as being manufactured by others than yourselves.

Objected to.

A. When my attention was called to the lamps by Mr. Eshelby he also stated that they had been giving them a great deal of trouble, and that they were a detriment to the business. I told him that in my own opinion the best thing he could do would be to entirely discard their use.

224*a* (Counsel for plaintiff moves to strike out the last answer.)

Q. Can you state when you first commenced the manufacture of the long lever by-pass-cock lamp, which was an improvement over the old lamp?

A. I would have to refer that question to Mr. Brognard.

Q. Can you state whether or not you have at all times during the existence of the contract relations between yourselves and the Chicago company been in position to furnish material as called for under the contract by the Chicago company?

A. My recollection is that since the date of this contract we have been in that position, yet I am not altogether positive.

Q. State whether or not the contract existing between your company and Mr. Wolf, referred to herein, which was subsequently assigned by him to the first Chicago company, was declared forfeited by your company; and, if so, state when and the reason of such forfeiture.

Objected to.

A. All of that data is in our attorney's hands.

Q. You can answer that question as far as you can. You know of its forfeiture and know the reason for it?

A. The contract was forfeited for non-fulfillment of its terms, but I do not remember the dates.

Q. State whether or not the contract which was afterwards entered into between your company and the Western company, or second company of Chicago, has been declared forfeited by your company; and, if so, state the reasons, and give, if you can, the date.

Objected to.

224*b* A. That has also been abrogated for failure to comply with its terms, but I cannot give the exact date of it.

Cross-examined.

By Mr. JACKSON:

Q. I will ask you if it is not a fact that at the time this contract

was made, say the date of November 9, 1887, your discounts to the trade generally were 25% off list price.

A. You say before that time or at that time?

Q. At that time or about that time.

A. That I do not remember.

Q. Is it not a fact that your discount at or about that time to the Chicago Co. was considerably more than 25% or considerably more than the discount made to the trade generally?

A. I should say it was more than 25% and more than made to the trade generally.

Q. Has your company ever made any discount to the trade in general of more than 50% off list price?

A. What do you mean? Since? Up to the present day?

Q. Say since Nov. 9, 1887, and May 1, 1889.

A. In some special instances I think we have.

Q. What do you mean by some special instances? Do you mean private arrangements between yourselves and some other parties? My question is directed to whether you have announced a discount of greater than 50% to the trade.

A. Not as an announcement; no, sir.

Q. Do you know of any of your lamps being used in the cities of Middletown and Dayton, Ohio?

225 A. I think some of our lamps have been shipped there.

Q. Are you aware by whom they were shipped there?

A. I think our company shipped some lamps to Middletown. I do not know about Dayton.

Q. Do you mean this company?

A. This company.

Q. Can you approximate the date when you shipped lamps to Middletown?

A. I cannot. Mr. Brognard would know that. But I have that only as an impression without being positive, and he could answer the inquiry definitely.

Q. Did you see lamps made by anybody else than your company in Cincinnati on more than one occasion?

A. Do you mean in imitation of the Lungren lamp?

Q. Yes.

A. I do not think I did.

Q. That occurred but once, the matter that you spoke of in your direct examination, of examining imitation lamps?

A. So far as I am concerned, yes, but once; but one of the lamps was sent us here for inspection.

Q. By whom?

A. By the Cincinnati Co. through our Mr. Gordon, who was there at one time and first discovered that the lamp was a spurious lamp.

Q. When *were you* in Cincinnati did you make an inspection of the lamp with a view of testing its practical workings?

A. No, sir.

Q. Did you ever personally make any such inspection of

226 the spurious lamp?

A. No, sir.

Q. Then you are unable to state whether the lamp would work well in a practical way or not, are you not?

A. The lamp which was sent as a sample was tested here, I think, and the conditions of construction were such, not being ide-tical or exact, as indicated the lamp would not work as well as our own make.

Q. That is what was reported to you by your parties here who inspected the lamp?

A. Yes, sir.

Q. But you personally are not aware of it?

A. Personally I did not make the test.

Q. No? So that, personally, you are not able to state from your own knowledge whether the lamp was as good a lamp as your own lamp or not?

A. Not from direct observation.

Q. I will ask you if it is not a fact that the Chicago company had a right, under certain conditions, to manufacture lamps themselves to be used in their own territory.

Objected to as irrelevant.

A. They had that right under certain conditions.

Q. Is it not a fact that they claimed that those conditions existed at the time that they manufactured these so-called spurious lamps?

Objected to as irrelevant.

227 A. They never made that claim to us, nor did we ever know that they had made those lamps until it was accidentally discovered by us.

Q. As a matter of fact, did not the conditions exist under which the Chicago people had a right to manufacture lamps?

Objected to as irrelevant.

A. No, sir.

Q. You are quite positive of that, are you?

A. Quite positive; yes, sir.

Q. You have state- that you are unable to give the date when you begin to manufacture the by-pass lever. I will ask you if it is not a fact that when you did begin, whenever it was, the Chicago Co. were pressing your company to furnish them quantities of the improved levers, and that your company was unable for a considerable time to furnish sufficient quantities of the said improved levers to supply the demand of the Chicago people?

A. That may have been possible, but I will have again to refer that to Mr. Brognard.

Mr. DIENST:

Q. Can you state who it was in your employ that made the test of the spurious lamps which was sent by the Cincinnati Co. and who reported to you as to the conditions of its action?

A. I do not remember.

Q. Under whose supervision would the test have been made?

A. I think Mr. Gordon would be the gentlemen who would have gone into the matter thoroughly.

Q. He is not here now?

A. He is not here.

228 Q. I will ask you whether there is any other contract between yourselves and the Chicago Co. except those which are attached to this deposition taken in Chicago—the first contract which you have identified and the second contract being that between your company and the Western company?

A. Not that I know of.

Q. The conditions referred to by you in your cross-examination as existing, the conditions upon which the Chicago people would have the right to manufacture lamps, were such as would be incorporated and embodied in the contract between your companies?

A. That condition was embodied in a contract made *bwteen* this company and the first of their companies.

Q. Mr. Wolf, in his examination in Chicago, states there was a reduction made to their company in the price of lamps furnished to it by you, and that it was made by reason of a verbal agreement between himself and yourself, that if you would ship lamps in bulk so as to make a small package and leave them unnickeled, they putting them together and nickeling them, they should have the benefit of such reduction. State whether or not such an agreement was made between Mr. Wolf and yourself.

A. There was.

Q. State what it was and state, if you can, the amount of such reduction.

A. My recollection is that we, he and I, for the company, agreed to sell them what we termed a 12-foot lamp in "knock down" form, and for 1,000 lamps to be paid for in cash, $12.50. Here (producing paper) is a memorandum—although there is no date

229 on it—*it* made at the time, setting forth the proposition.

Q. And that memorandum is in your handwriting?

A. Yes, sir.

Q. Was this the only agreement between you?

A. I think that was all. I do not remember anything else.

Q. Do you know the date of it?

A. I do not; but undoubtedly—or perhaps Mr. Brognard could tell by reference to the books about when the shipments were made on that basis of price.

Q. Can you state whether or not there are other lamps in the market that are an infringement upon your Siemens-Lungren lamp?

Objected to. Sustained.

A. There are lamps which we consider as an infringement.

Q. State what the lamps are and the names.

Objected to. Sustained.

A. There was recently received a lamp from Cincinnati called

Wood's incandescent gas lamp, which upon examination inclined us to the belief that it is a direct infringement.

Q. You may state whether you have examined the Wenham and Franklin lamp.

A. We have always considered the Wendham lamp an infringement on the Lungren. We have never thoroughly investigated the question of the Franklin lamp.

Q. State whether or not you have commenced any proceedings in any of the courts of these United States with a view of testing the validity of their patents.

Objected to.

230 A. We have a suit pending for an infringement against the Wenham lamp.

Q. Where is it?

A. In New York, in the United States court.

By Mr. JACKSON:

Q. Is your lamp, as a complete lamp, patented, or is really what is known as the burner of the lamp patented?

A. The combination that go to make up the lamp proper are patented.

Q. Outside of the burners, governors, and flame plates, is there anything else protected by your patents?

A. It is all protected in combination with the exception of the governor; there is a patent aside from the lamp patent.

Q. Do you recollect visiting Chicago some time in the summer or fall and there having a conversation with either L. J. Wolf or Joseph Wolf with reference to their beginning to manufacture lamps in Chicago on royalty?

Objected to as irrelevant.

A. No, sir. I do not remember any such conversation.

Q. Is it not a fact that in this lamp which you saw in Cincinnati and which is claimed to be an infringement that the burner, governor, and flame plate were made by your company here, and that all that was made in Chicago was the mere shell of the lamp?

Objected to as irrelevant.

A. Upon examination, as I remember, there were a number of the castings that go to make up the lamp bought, which
231 were made in imitation of ours; I am not particularly clear about the burner and flame plate.

Q. You are not able, then, to state whether the burners and governors and flame plates of those so-called spurious lamps were made here, Philadelphia, or Chicago?

Objected to as irrelevant.

A. I can look at the lamp we have here and let you know in reference to that one.

Q. Have you that lamp here still?

A. Yes, sir.

Q. In the same condition that it was when received by you from Cincinnati?

A. So far as I know, it is.

Q. It is a fact, is it not, that any differences which formerly existed between your company and either of the Chicago companies or Mr. Wolf have been compromised and adjusted?

A. I believe they all have; yes, sir.

232 HENRY A. BROGNARD affirmed.

By Mr. DIENST:

Q. State your age, name, residence, and occupation.

A. Henry A. Brognard; age, 48; residence, Philadelphia; secretary and treasurer of the Siemens-Lungren Co. about 5 years, since its organization.

Q. State whether you are familiar with the terms of the contract between your company and Joseph Wolf, which was subsequently assigned to the first Chicago Co., and whether you are also familiar with the contract between your Co. and the Western Co., the second company.

A. Yes, sir.

Q. State at what prices you furnished lamps under that first contract and under the second contract.

Objected to.

A. We supplied all lamps under the original contract, which was finally assigned to the Siemens-Lungren Gas Illuminating Co. of Chicago, strictly under the prices and conditions mentioned in the contract, which I believe was taken from our price-list, up to a certain date, when a rebate was made under certain conditions for a large number which were shipped, the rebate being in consideration of their taking the lamps in large quantities, payment in cash, and their being shipped in "knock-down" form, not put together by us. The prices were changed somewhat when the agreement was finally made with L. J. Wolf, which was eventually assigned to the Western Siemens-Lungren Co. All lamps supplied under that agreement were in accordance with its terms, with the exception
233 of one order of 250 lamps sent to Cincinnati by order of the Western Siemens-Lungren Company, on which there was an additional discount made of 5 %.

Q. Then all the lamps were furnished at the regular list prices, less 50 % discount mentioned in the contract?

A. Yes, sir; with the exceptions mentioned in the last answer.

Q. State how many reductions were made in the price of lamps furnished to the trade from time to time since the contract entered into between your company and Mr. Joseph Wolf.

Objected to.

A. That I could not do without a very lengthy examination of the books, because we sold lamps under different conditions to dif-

ferent parties. I can give you the number of changes that have been made in the list price.

Q. Please state whether or not you published list prices from time to time, issued them to the trade, and sold in accordance with the prices stated therein.

Objected to.

A. We have made but one change in our list price since originally it was issued, under which we sold lamps to the Chicago Co. under the original agreement.

Q. When was that change made?

A. In the latter part of October, 1887.

Q. State whether or not this price-list now handed you is the price-list to which you refer.

A. It is the latest price-list. That is the only change. There has been no change since.

(Price-list marked Exhibit A and attached hereto.)

Q. Will you refer to that list and state what discount is made therein on the prices named?

234 Objected to.

A. It depends upon circumstances.

Q. You can state the circumstances.

Q. If you want a lamp we do not make any discount.

Q. State when your discounts go into operation as to quantity.

A. Our discounts to general agents and large consumers is 50% from this price-list except on the special list; that is 33⅓ %. To the jobbing trade it is 33⅓ % from the general list and 25% from the special list.

Q. Under what lists would you classify the Cincinnati company?

Objected to.

A. If they buy under the special list they would be under the special list; if they buy under the general list they would be under the general list.

Q. I will ask you to examine design B on the list and to state whether or not that was the character of lamp which was furnished to the Chicago company.

A. It was, except where we supplied the A, a plain lamp, and they did their own nickel-plating; they converted it into a B.

Q. State what the discount was on B.

A. 50%.

Q. I ask you to state what the list price is there for a 12-foot lamp.

A. $26.

Q. That was the price at which you furnished the trade generally, except, as you stated, on special occasions, when possibly special rates were given?

A. That was the price we supplied the trade generally on
235 special cases.

Q. By that you mean, of course, if they purchased in quantities?
A. I mean to such parties as were expected to be in position to supply jobbing trade.
A. And the Chicago Co. was classed under that?
A. They were classed under that; yes, sir.
Q. And the Cincinnati Co. were classed under that line?
A. We classify them that way now.
Q. Will you kindly refer to your books and state the prices at which these lamps were first furnished to the Chicago Co.? I think you stated that you could ascertain that by an examination.

Objected to.

A. I have already stated that they were furnished at 50 % from the price-list.
Q. In your examination, in answer to the question a moment ago, you stated that a special price was made to the Chicago Co., they receiving the lamps in knock-down form and they doing the nickel-plating in Chicago; please state the date of that agreement.
A. I find, on referring to the books, that the last shipment made to the Chicago company under that special arrangement you allude to was under date of September 29, 1887.
Q. And you may state the quantity there.
A. 100 lamps.
Q. That was at $12.50 cash?
A. It would have been if it had been that size lamp; it was another sized lamp with the same proportionate reduction.
A. It was not the 12-foot lamp?
236 A. No, sir; it is what is denominated as 16-foot; the reduction on those was $1.32 apiece.
Q. I think Mr. Wolf said it was a 12-ft. lamp?
A. Yes, sir, but they assorted the sizes in their order, and a proportionate reduction followed the different sizes.
Q. So that that agreement applied to other lamps?
A. Lamps of other sizes; it was immaterial to us which size they wanted.
Q. I am only speaking of Mr. Stein's memorandum.
A. That was intended to cover other sizes on that basis. The next shipment was made to them October 26, 1887; that was made under the new price-list, 50 % off the list.
Q. State whether or not, prior to the issuance of this price-list according to which you have testified and which I ask you to attach to your deposition, your company announced a discount generally to the trade.

Objected to.

A. Yes, sir; the first price-list was in force from the first manufacturing of the lamp up to the time this list was issued. Our general discount from the old price-list was 25 %, except to territorial agents, with whom we had special agreements.
Q. There was a special agreement that you mad- with Mr. Wolf?

A. Yes, sir; they were territorial agents and were under special arrangements.

Q. Referring to your former answer that the discount of 50 % as indicated by the price-list on No. 12 lamp was made the latter part of October, 1887, state whether or not that has reference to your compiling it here or whether it has reference to the publication and announcement *of* the trade.

237 A. The new price-list as mentioned in the catalogue of November 21, 1887, was compiled and announced by us during October of that same year in correspondence, but it was some months, probably a year, after that time before we announced a discount to large dealers of 50% of this list.

Q. Then there was a 25% discount on this list?

A. For some time after it was issued.

Q. Where are your discounts announced here?

A. They are not announced.

Q. Can you give the date when your 50% discount went into effect?

A. It never has gone into absolute general effect except under certain circumstances.

Q. Can you state about the time that you determined to make a reduction?

A. The first time we ever published or printed a discount sheet of 50% for our plain Lundren lamps was in Sept., 1889.

Q. State whether or not you have any copies of the discount lists which you published and announced since the time the contract between yourselves and Mr. Wolf was made.

A. We never published one until September, 1889, and that I can give you.

Q. State whether or not, as early as January, 1888, a discount of 33⅓% was not in some cases announced by you off of the price-list as given in catalogue of Nov., 1887.

Objected to.

A. It might have been in some cases; we might have made sales in some cases greater than 25%.

Q. So that I understand you that your discounts, even as
238 early as Nov., 1887, ranged from 25% to 33⅓% to the trade?

Objected to.

A. If we made any sales at a discount greater than 25 % they were exceptional. I do not think any were made except under special agreement to our territorial agents.

Q. When did you first make a reduction or announce a discount of 33⅓ %?

Objected to.

A. The first announcement to the trade of a discount exceeding 25 % was made by a circular letter issued and sent to certain large dealers April 9, 1888, of 33⅓ %.

Q. Can you state when your company first commenced the manufacturing of the improved long-lever by-pass cocks?

A. Somewhere about June, 1888. I cannot tell you exactly.

Q. State whether or not you were at all times prepared and did ship to Mr. Wolf and his assigns all the material, lamps, called for by the contract and which may have been ordered by him.

A. We were and did.

Q. State whether or not your company has sold any of the lamps covered by the contracts in question to parties in Middletown, Dayton, and Hamilton, Ohio, and, if so, the dates and amounts, since Nov., 1887.

A. We supplied Middletown, Ohio, the Middletown Gas Co., in Nov., 1888, with 8 lamps; in Dec., 1888, 24 lamps; August, 1889, 53 lamps; September, 1889, 24 lamps; December, 1889, 4 lamps.

Q. Was there any prior to November, 1888?

A. None prior. That was the first shipment we made.

Q. (Paper shown witness.) Please examine this list and state whether that is the price-list under which the Chicago Co.
239 was supplied and in force at the time the contract was first entered into.

Objected to.

A. It is the first price-list of the Lungren lamp which was issued after the execution of our agreement with the Chicago Co. You are alluding to the contract made between this company and Jos. Wolf, whereby we conveyed to him the State of Ohio. I identify this as the price-list which was in use at the time.

(Paper marked Exhibit B and attached hereto.)

Q. State whether or not you maintained any different prices or gave any discount other than those stated in your testimony for the State of Ohio.

Objected to.

A. None whatever.

Q. I will ask you to examine Exhibit A and state whether or not design C is the improved by-pass long lever cock.

A. No, sir; the cock shown in this sketch is what we termed a combination long lever by-pass cock. It is a different cock entirely from the one we have been supplying and which is shown in all our later cuts.

Q. Please examine design C, Exhibit A, and state what that lamp is, and when you first commenced its manufacture and what you considered the improvements at that time.

Objected to.

A. We first introduced design C a month or two prior to the date of the catalogue, which was during the summer of 1887.

Q. State whether or not the contract existing between your company and Joseph Wolf and between your company and the Western

Co. have been declared forfeited, and, if so, state the reasons and give the dates.

Objected to.

A. All contracts which were made with Joseph Wolf or his
240 assigns, including the contract between this company and the Western Siemens-Lungren Co, have been declared void; just the days I cannot give; it is a matter that is in the files of papers at our attorney's office.

Mr. Jackson moves to strike out the last answer.

Cross-examined.

By Mr. JACKSON:

Q. If I understand your direct examination, the original arrangement between you and the Chicago Co. was that they were to have a discount of 50% off of your then price-list; is that correct?

A. The agreement states that—I do not have it before me and I do not just remember—50% was to be off of the prevailing price east of the Rocky mountains or Mississippi river; something like that.

Q. Now, when you published your new list, in October of 1887, that arrangement applied to the new list, did it not?

A. Yes, sir.

Q. So from that time on your arrangement with the Chicago people was that they were to have 50% off of the list price, as shown in Exhibit A?

A. Yes; from the time this list was established.

Q. And that list was established some time in October, 1887?

A. Yes, sir.

Q. I understood you to say that the arrangements between your company and the Chicago company as to the shipping of
241 lamps in knock-down form were all prior to the publishing of this list marked A; is that so?

A. Yes, sir.

Q. After Exhibit A had been published, did you ship lamps to the Chicago people in knock-down form?

A. Yes; we sent them some lamps in knock-down form under the list as mentioned in Exhibit A.

Q. When lamps was so sent in knock-down form after October, 1887, was there any further reduction made in the prices of such lamps other than the 50% off the list price?

A. No, sir.

Q. Then, if I understand you, after October, 1887, there was no reduction made to the Chicago people at all, except in one instance of 250 lamps that were sent to Cincinnati; is that correct?

A. No; that is not correct; you are examining me as to these prices under, as I understand, the original agreement with the Chicago Gas Lamp Illuminating Co.; that agreement was abrogated and finally one made with L. J. Wolf, afterwards assigned to the Western Siemens-Lungren Co. Now, the answer I have given you

all had reference to the lamps which were shipped under the original or old agreement, previous to the one made with L. J. Wolf abrogating that one.

Q. The original agreement was declared forfeited by your company, was it not?

A. Yes, sir.

Q. What do you mean by stating that the agreement was $12.50 net?

242 A. Had we sold them on the list price of $26 for that style and size of lamp with the discount of 50 %, the net price of the lamp would have been $13, but our agreement called for us to deliver them to him at $12.50 net, meaning no further rebate or discount. We were to draw on the 10th of each month for the goods supplied the previous month with fifteen days' sight draft. The old time was 60 days.

Q. Then that reduction was a reduction of 50 cents on a $13 transaction, was it not?

A. Yes, sir.

Q. You may state whether at any time between November 9, 1887, and July 30, 1888, any other reduction was made to either of the Chicago companies excepting the one just referred to of between three and four per cent. to Mr. Leopold J. Wolf and the usual discount of 50 % off of the list—I mean exclusive of 250 lamps sent to Cincinnati, to which I will come separately.

A. None whatever.

Q. You shipped, did you not, 250 lamps to Cincinnati upon the order of the Western Siemens Company?

A. Yes, sir.

Q. Now, from Oct., 1887, up to the time that that original agreement was forfeited, was there any other reduction made in the price of lamps furnished the Chicago Co. except the reduction of 50 % off the price-list, Exhibit A?

A. Not at all.

Q. After April, 1888, when the new arrangement was made between your company and L. J. Wolf, what was the price established with reference to the list price in Exhibit A?

243 A. The prices by that agreement were made or rather were established as net prices, covering the leading sizes and styles of the Lungren lamps. They were somewhat lower than they would have been made by a 50 % reduction from the price-list. We were to supply the 12-foot nickel-plate B. lamp at $12.50 net.

Q. I will ask you to state, by reference to your ledger, how many lamps you supplied Leopold J. Wolf or the Western Siemens Co. from the time that this new arrangement was made until the shipment of the 250 lamps to Cincinnati, exclusive of that shipment.

A. 50 lamps.

Q. Then, exclusive of that shipment of 250 lamps to Cincinnati, this new agreement as to the price only applied to 50 lamps. Is that correct?

—. ——.

Q. You may state what, if any, reduction was made upon those

250 lamps other than the usual 50 % and the additional 50 cents on a $13 lamp that you have referred to.

A. An additional discount from the face of the bill of 5 %.

Q. (Paper shown witness.) I will ask you to look at this bill and state if that is a bill of your company for the 250 lamps referred to.

A. Yes, sir.

Paper identified, marked Plaintiff's Exhibit 1, offered in evidence by Mr. Jackson and hereto attached.

Q. You may state whether the Western Siemens-Lungren Co. was charged by you with the amount of said bill, and whether it is not a fact that you sued them to compel its payment, which suit has recently been compromised.

A. The bill was charged as stated in the question and sued for and compromised.

244 Q. If I understood you, the new price-list went into effect some time during the month of October, 1887, although it bears date Nov. 21. Is that correct?

A. Yes, sir.

Q. Is it not a fact that during the time of your business relations with the old Chicago Co. they were frequently complaining that their orders for lamps were not filled in time, and that that was a subject of some controversy between you?

A. No; except probably in the earliest days of our manufacturing they would want work made and delivered quicker than we could get it manufactured.

Q. And is it not a fact that during the summer and fall of 1886 you were unable to supply the Chicago Co. with lamps within 60 days from the date of the order?

Objected to.

A. No, sir; we never failed to supply any order within 60 days of its date.

Q. Is it not a fact that you had orders from the Siemens-Lungren Gas Illuminating Co. on or before March 22, 1886, amounting to 382 lamps, and that your deliveries to them up to and including May 22, 1886, were only 258 lamps, making a shortage in 100 days of 124 lamps?

Objected to as irrelevant.

A. I would have to make an examination of the books to give you that information. I could not tell you. It would not have been a default if it was. We never engaged with them to complete an order up to 60 days, whatever they chose to order. I would have to search the books pretty thoroughly to give you that in-

245 formation *information* and probably could not give it to you this afternoon.

Q. For the purpose of refreshing your recollection, I call your attention to one letter dated October 23, 1886, and ask you to state if about that date it is not a fact that the Chicago people were complaining about not being able to receive goods that they ordered,

and did you not answer them stating substantially that you were obliged to give your other agents some of the lamps and were already supplying them with about one-half of those which you were able to manufacture?

Objected to as irrelevant.

A. Yes; that was the case.

Q. Is it not a fact that the lamps which Mr. Stein saw in Cincinnati and designated in his examination as spurious, and one of which subsequently was sent East, contained burners, governors, and flame plates which were manufactured here, and that all that was manufactured in Chicago was the shell of the lamp?

Objected to as irrelevant.

A. No, sir; the lamp sent here from Cincinnati, referred to as a lamp proper, had been manufactured by some one other than ourselves. It had with it a governor, which was not necessarily a part of the lamp at all; a brass burner, a flame plate, which had been supplied by us. The body of the lamp had been made by some one else.

Q. How about the burners; were they not manufactured by you?

Objected to as irrelevant.

246 A. Yes, sir.

Q. About the by-pass lever. I believe you said that you began the manufacture of the improved long lever some time in June, 1888?

A. Yes, sir.

Q. Did you ever supply any of those improved levers to the Chicago company?

A. I do not remember whether we did or not. We have always been ready to supply them in exchange for the old cocks to all of our customers.

Q. After June, 1888, you only sold a few lamps to Chicago exclusive of the 250?

A. Very few.

Q. Prior to June, 1888, you supplied your most improved form of lamp, including the by-pass lever, with other improvements that had been made up to that time, to the Chicago people, did you not?

A. Yes.

Q. Was there any difference in the by-pass lever furnished your customers, say, in November, 1887, and those furnished, say, in April or May, 1888?

A. When lamps were asked for or ordered with the long-lever combination by-pass cock it was put on. In that case there was a difference. Lamps not ordered with that cock previous to or about June, 1888, were supplied with short-lever cocks.

Q. This long-lever combination cock, is that the same which you commenced to manufacture in June, 1888?

247 A. No, sir; the long-lever by-pass cock I spoke of was commenced to be manufactured about June, 1888, was simi-

lar to the old short-lever cock except so far as its lever was concerned.

Q. Then prior to June, 1888, when you received orders for lamps, without designating any particular combination or particular kind of lever, you sent the short-lever cocks?

A. Short-lever cocks.

Q. The 250 lamps sent in July to Cincinnati were among the early shipments sent out by you which embodied the long lever, were they not?

A. Yes, sir.

Q. Are you aware of any lamps having been shipped by your company to Hamilton or Dayton, Ohio, during the period covered from November 9, 1887, to July 1, 1888?

A. (Referring to books:) We never sent a lamp to Dayton or Hamilton.

Q. As to the forfeiture of the several contracts with the Chicago parties, they were simply declared forfeited by your company, were they not? You never commenced any action for the purpose of having a decree of a court declaring them forfeited?

A. That is a matter I could not answer. It is in the hands of our attorney, Mr. Pettit. It is my impression that the forfeiture was acknowledged by them. I know it was so far as the Chicago Siemens-Lungren Gas Illuminating Co. was concerned.

Q. You have spoken in your direct examination of various general discounts which were from time to time announced to the
248 trade generally. I will ask you if any of those discounts applied as between your company and the Chicago Co., or whether it is not so that the Chicago company's prices were regulated by special contract of the time.

A. The Chicago companies' prices under all the agreements were regulated by the special agreement.

Q. I will ask you if it is necessary, in conducting the business of introducing and selling the Siemens-Lungren lamp, to send men at stated periods to each lamp in use for the purpose of repairing the same.

Objected to.

A. No; not generally so.

Q. It is usual, is it not, to send a man periodically for the purpose of cleaning the globes and taking off any sediment that may have accumulated or some matter of that kind to keep the lamp in good working order?

A. No; not exactly; that is generally done by the owner of the lamp, as they would take care of anything else which they might own.

By Mr. DIENST:

Q. Is your company engaged in cleaning the lamps here in Philadelphia or do you simply sell to others?

A. We sell and rent both. Where we rent the lamps it is a part of our contract that we supply the repairs and look after them and

attend to them. Where we sell them we have no further interest in them.

Q. And where you rent you have, of course, in your employ a force to give the lamps such attention as may be needed?

A. Yes, sir.

249 Q. Making the necessary repairs, bringing them here, if necessary; giving them time, labor, and attention necessary and proper to keep them always in good condition?

A. Yes, sir; the lamp being our property, we look after it and take care of it.

Q. The 250 lamps spoken of as being shipped direct from the Philadelphia Co. to Cincinnati were shipped upon order of the Western Company, were they not?

A. Yes, sir.

Q. You have had occasion to correspond with the Cincinnati Co. with regard to the condition of those burners of those lamps?

Objected to. Objection sustained. Defendant's counsel excepts.

A. I think there were brass burners supplied with the lamps.

Q. (Letter shown witness.) I ask you to refer to this letter and state whether it is not a letter sent by you.

Objected to. Objection sustained. Defendant's counsel excepts.

A. Yes; it is dated October 28, 1889.

Q. I will ask you to attach it to your deposition.

Plaintiff objects. Objection sustained. Defendant's counsel excepts.

Letter marked "Exhibit C" and attached hereto.

Q. State whether or not you have offered to make the exchange of burners upon the payment of the sum of money direct to your company by the Cincinnati Co.; and, if so, state what amount per lamp you desire to have for the purpose of making the exchange.

Objected to. Objection sustained. Defendant's counsel excepts.

250 A. I do not think we made such an offer. We might have done it, but I can tell you what it would be if we did make the offer.

Q. Do you remember any correspondence on the subject?

A. No, I do not remember. I can tell you what we would do. We have a regular price for those things. I think we had some correspondence, but I cannot find it without thumbing over a good many letters.

Q. State what the price would be in exchange which you would require per lamp in order to make the exchange.

Objected to. Objection sustained. Defendant's counsel excepts.

A. $3 per lamp for the 12-foot size.

Q. State whether or not exchanges have been made and are being made by your company to persons and companies that have pur-

chased direct from you without any additional charge being made therefor.

Objected to. Objection sustained. Defendant's counsel excepts.

A. We are ready at all times to give any one a proper tube burner in place of a solid metal burner for any lamp which they bought from us and paid, free of charge.

By Mr. JACKSON:

Q. You may state whether at the time these 250 lamps were shipped to Cincinnati they were supposed by your company to be lamps of the most approved pattern and in good order and condition.

A. They were, with that doubt as to the burner which could be only proven by experience and which required time to de-
251 termine.

Q. You may state whether the Chicago company was in any way to blame for the subsequent defect which appeared in the solid metal burners.

A. Only in so far as they did not pay their bill and therefore they could not get the proper ones. That is the only way I know them to blame.

Q. You may state whether any reduction was made in the bill which you rendered the Chicago company on account of these solid metal burners or whether any reduction on that account was made in the suit which you subsequently brought against it.

A. Not at all.

252 EX. "A."

Price-list, November 21st, 1887, the Lungren Regenerative Gas Lamp.

The Siemens-Lungren Co., 21st street & Washington avenue, Philadelphia, Pa.

EX. A.

252*a* *Price-list and Descriptive Circular of the Lungren Patent Regenerative Gas Lamp, November 21st, 1887.*

Presented by —— ——.

252*b* The Lungren patent regenerative gas lamp.

A system of burning gas, whereby its illuminating power is increased from 300 to 400 per cent. without the expense, trouble and annoyance resulting from the use of hydrocarbon enriching material.

252*c* About 20,000 Lungren lamps are now in use. Testimonials, references, or any desired information cheerfully given upon application to us, or any of our agents.

THE SIEMENS-LUNGREN CO.,
Philadelphia.

November 21st, 1887.

Read the notice on page 9.

252*d* Thirteen candle power per cubic foot of gas.

This result was obtained by the judges appointed by the Franklin Institute of Philadelphia, at their Novelties exhibition in October, 1885. (See copy of tests and reports on pages 4, 5, 6.)

The Lungren lamp embodies a simple method of burning gas, and presents many desirable features. The flame of the lamp being below the fixture, there is nothing in the way to cast a shadow or intercept the light, and its full power is at once made available. It is simple in construction, easily managed, and can be fitted to ordinary supply pipes, without alteration.

It is especially applicable for lighting offices, stores, factories, mills, show-windows, libraries, and all situations where an increased illumination is desired.

A Lungren lamp, consuming 12 cubic feet of gas per hour, will give as much light as 45 cubic feet consumed by the ordinary method.

THE SIEMENS-LUNGREN CO.,
N. E. Cor. 21st & Washington Ave., Phila.

252*e* The Siemens-Lungren Company received the only silver medals of the Franklin Institute, awarded for gas-burners at the Novelties exhibition, held at Philadelphia, in October, 1885. The following abstracts are from the report of the committee on awards:

From committee report.

"The Lungren inverted gas lamp owes its efficiency to the heating of the air and gas, which enter the flame by means of the waste heat, which is leaving the lamp. Resembling in this respect the Siemens lamp, it has peculiarities, which render it noticeable, and increase its value to a marked degree.

The flame and the illumination are below the structure of the lamp itself; there are no shadows, and the light thrown down from the suspended lamp is entirely unobstructed. The lamp is, also, of a form and structure which admits of its use in a variety of places, where the Siemens lamp could not be used so conveniently. Finally, its efficiency is much higher than that of the Siemens lamp in small and medium lamps, such as are used in the lighting of offices, stores, and apartments of moderate dimensions. Its value for general illumination is, for this reason, greater."

252*f* The quality of the light for brilliancy, steadiness, and color is unsurpassed; and the lamp itself is simple in its construction, and of a pleasing and agreeable design.

"In measuring the light of the lamp, your committee found it necessary to construct a photometer for the angular measurements. Horizontal measurements were made on the bar photometer used in testing the Siemens lamp. The flame of this lamp being entirely below the lamp, however, the horizontal rays do*es* not represent its efficiency in actual use."

RESULT OF MEASUREMENTS.

Tests Made November 5th, 1885.

Measurement at an angle of 45 degrees below the horizontal line.		Vertical measurement.	
Candle power of city gas equal to 17.69 candles.		Candle power of city gas equal to 18.60 candles.	
Gas burned per hour (cubic ft.)	16.20	Gas burned per hour (cubic ft.)	16.00
Candle power	197.16	Candle power	223.86
Candle power per ft. of gas	12.17	Candle power per ft. of gas	13.96

252*g* "In view of the advantages of this lamp, as stated previously, and of its remarkable efficiency, as shown by these tests, we would recommend the award of the silver medal to this lamp, together with the diploma of the institute.

Furthermore, in view of the fact that the Siemens-Lungren Company have established the manufacture of the Siemens and Lungren lamps in a way to supply the demand in all the required sizes thereof, and have added a new and valuable industry to those already established in this city, we would recommend the exhibit to the committee on science and arts of the Franklin Institute for further award."

THE SIEMENS-LUNGREN CO.,
N. E. Cor. 21st & Washington Ave., Philadelphia.

252*h* Extract from report of committee appointed by the Secretary of the Treasury for a thorough investigation of all known gas-saving devices, under an act of Congress dated August 4th, 1886.

This committee, after exhaustive tests covering a period of several weeks, presented their report under date of February 14, 1887, which report is now on file in the office of the chief clerk and superintendent of the Treasury building, and is open to inspection by those interested. The committee state: "The Lungren lamps have been in daily use in the corridors, and have proven exceedingly effective, and able to stand well the test of practical use. The leading principle of the lamp,—superheating the air before combustion—produces the results of a brilliant flame of excellent color, and high illuminating power. One of the lamps of the larger (the 16-ft. burner) size,—consuming 13 ft. gas per hour—has been burning at the east or main entrance of the Treasury Department, and has yielded as much light, and practically illuminated as much space as the 12-light chandelier which hangs in a similar space at the west entrance, which chandelier consumes 48 ft. of gas per hour."

As to the consumption of these lamps, the committee say: "They have satisfied themselves by careful and thorough tests for periods of 12 to 36 hours, running the gas through ordinary meters,
252*i* and in no instance did the consumption exceed 13 ft. per hour for the 16-ft. lamp and 10 ft. per hour for the 12-ft. lamp, (the gas used being that regularly supplied by the Washington Gas Light Co.)"

The governor attached to each lamp was especially examined by the committee, and they reported on it: "The governors maintain a uniform flow of gas at any pressure, without the slightest variation of consumption, at different pressures varying from ½ inch to 3 inches."

In closing their report, the committee stated that "in view of the results of their examination of the Lungren lamp, they feel justified in recommending that it be adopted by the department for all spaces in the corridors, and for all rooms where full light is continuously needed." Report signed by

A. T. HUNTINGDON,
W. W. UTTZ,
J. N. TOWNER,
Committee.

252*j* Notice.

For the best general effect, the 8-ft. Lungren lamp should be hung so that the flame will be eight feet from the floor; the 12-ft. lamp should be hung with its flame nine feet from the floor, and the 16-ft. lamp, ten feet from the floor.

Observe that these lamps are controlled by the governor as to the amount of gas desired to be consumed in them, the cock being turned wide open by means of the chain.

The by-pass on the cock is very simple, and readily set. It should be so set that but a light-blue flame will burn when the cock is pulled down to its by-pass.

It is best to set the governor and by-pass at some time during the evening, when the gas is most uniformly rich in quality. In
252*k* many cases the gas supplied at times is not so rich during the earlier hours of the day, and if the governor is set at that time to admit gas sufficient to make a full-sized flame, the same quantity of the richer gas will be admitted in the evening, which will make the flame too large.

When setting the governor—which should be done after the lamp has become thoroughly heated—observe that the points of the flame do not curl up too far around the outer edge of the flame plate. In other words, it is best not to burn the lamp with too high a flame, as there always should be some little margin allowed for disturbances, and still not interfere with perfect combustion.

When hanging the lamp, and before it is lighted, be careful to remove any straw or other foreign substance which may during packing and handling have gotten into the air passages. The open slot around the white enamelled deflector—which can only be seen when the globe-holder is open—should always be free and unobstructed.

252*l* When placing the flame plate on the lamp, with the brass burner secured to its place, see that the outer rim of the flame plate does not hang at a level lower than the end of the brass burner tubes.

Should any irregularity occur in the shape of the flame, remove

the flame plate and see that the perforated portion is entirely clean and free from foreign substances. If the flame plate is perfectly clean, pass the wire cleaner which accompanies each lamp up through the burner tubes, and also clean the governor.

Observe the printed directions which accompany each lamp, as to the management of both the burner and governor.

Keep the glass globes clean.

As lamps, when shipped, receive rough handling and treatment in transit, we feel called upon to present the above, and respectfully request that this notice be carefully read.

THE SIEMENS–LUNGREN CO.,
Philadelphia.

252*m* *Price-list and Description of Designs.*

☞ The consumption of the lamps given in this catalogue is rated on 18-candle-power coal gas,—with richer gases the consumption is proportionately less.

252*n* Description.

Design A.—This is the plainest form of lamp, and is of black iron throughout. It is supplied complete with governor, by-pass cock, stop-cock, chains and glass globe, ready to hang in position.

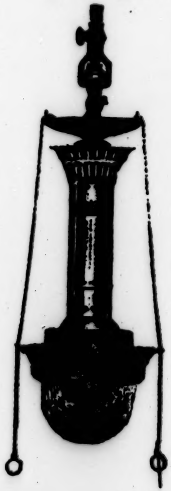
This design is supplied in the 8-ft., 12-ft. and 16-ft. sizes.

252*o* Description.

Design B is nickel-plated and fitted with nickel-plated trimmings and canopy. It is supplied complete with governor, by-pass cock, stop-cock, chains and glass globe, ready to hang in position.

This design is supplied in the 8-ft., 12-ft., and 16-ft. sizes.

Consumption per hour.	Candle power at angle of 45°	Extreme length.	Price complete.
8 ft.	100	26 ins.	$24.00
12 ft.	150	28 "	26.00
16 ft.	200	31 "	31.00

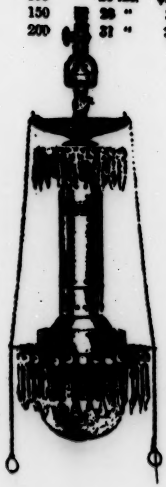


DESIGN B.
NICKEL PLATED.
See opposite page for description.

Consumption per hour.	Candle power at angle of 45°	Extreme length.	Price complete.
8 ft.	100	26 ins.	$22.00
12 ft.	150	28 "	24.00
16 ft.	200	31 "	26.00

DESIGN A.
ALL BLACK IRON.
See opposite page for description.

Consumption per hour.	Candle power at angle of 45°	Extreme length.	Price complete.
8 ft.	100	26 ins.	$29.00
12 ft.	150	29 "	31.00
16 ft.	200	32 "	36.00

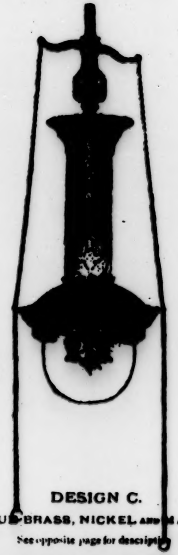


DESIGN B1.

NICKEL AND GLASS PENDANTS

See opposite page for description.

Consumption per hour.	Candle power at angle of 45°	Extreme length.	Price complete.
8 ft.	100	23 ins.	$23.00
12 ft.	150	25 "	27.00
16 ft.	200	28 "	31.00



DESIGN C.

ANTIQUE BRASS, NICKEL AND MAJOLICA

See opposite page for description.

252*p* Description.

Design B 1.—This lamp is same as the design B, with addition of glass pendants. It is supplied complete with governor, by-pass cock, stop-cock, chains and glass globe, ready to hang in position.

The design is supplied in the 8-ft., 12-ft., and 16-ft. sizes.

252*q* Description.

Design C.—This lamp is designed to be more ornamental than the A and B designs. It is supplied complete with governor, improved long cross-lever combination by-pass and stop cock, chains and glass globe, ready to hang in position. It has a majolica chimney, and is finished in nickel and antique brass trimmings.

This design is supplied in the 8-ft., 12-ft., and 16-ft. sizes.

252*r* Description.

Design special II.—This lamp is supplied complete with governor, by-pass cock, stop-cock, chains and glass globe, ready to hang in position. It is finished in nickel, with trimmings of solid brass, antigue and bronze finish.

This design is supplied in the 8-ft., 12-ft., and 16-ft. sizes.

252*s* Description.

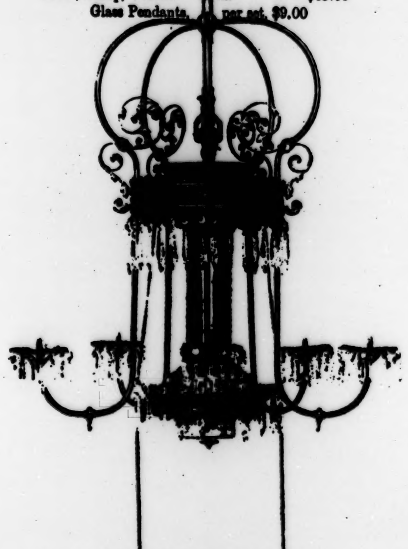
Design D special.—This chandelier is a combination of a Lungren lamp, with three ordinary gas jets. It is supplied complete ready to hang, with governor, by-pass cock, stop-cock, chains, and glass globe. It may be finished either in nickel or antique brass, but will always be sent in nickel unless otherwise ordered. Glass pendants and appropriate glass cone globes, of a neat etched design, will be supplied when ordered.

This design is supplied with either the 12-ft. or 16-ft. size Lungren lamp.

SPECIAL LIST.

Combined wish.	Extreme length.	Spread.	Price complete without pendants.
16 ft., Lamp,	38 in.	30 in.	$43.00

Glass Pendants, per set, $9.00



DESIGN "SPECIAL E."

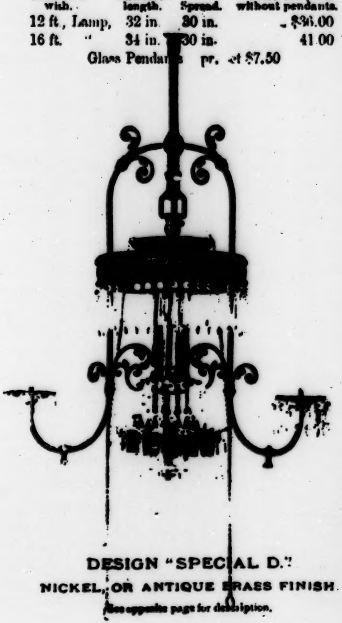
NICKEL, OR ANTIQUE BRASS FINISH.

See opposite page for description.

SPECIAL LIST.

Combined wish.	Extreme length.	Spread.	Price complete without pendants.
12 ft., Lamp,	32 in.	30 in.	$36.00
16 ft. "	34 in.	30 in.	41.00

Glass Pendants, per set $7.50



DESIGN "SPECIAL D."

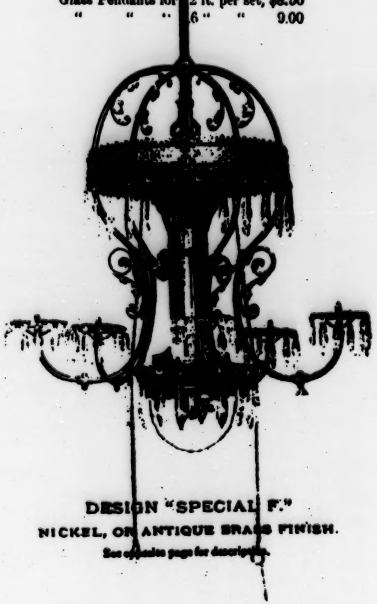
NICKEL, OR ANTIQUE BRASS FINISH.

See opposite page for description.

SPECIAL LIST.

Combined with.	Extreme length.	Spread.	Price complete without pendants.
12 ft., Lamp,	32 in.	28 in.	$40.00
16 ft. "	34 in.	28 in.	45 00

Glass Pendants for 12 ft. per set, $8.50
" " " 16 " " 9.00



DESIGN "SPECIAL F."

NICKEL, OR ANTIQUE BRASS FINISH.

See opposite page for description.

SPECIAL LIST.

Consumption per hour.	Candle power at angle of 45°	Extreme length.	Price complete.
8 ft.	100	28 in.	$34.00
12 ft.	150	30 "	36.00
16 ft.	200	33 "	42.00

DESIGN "SPECIAL H."

ANTIQUE BRASS, AND NICKEL FINISH

See opposite page for description

252*t* Description.

Design E special.—This chandelier is a combination of a Lungren lamp, with five ordinary gas jets. It is supplied complete, ready to hang, with governor, by-pass cock, stop-cock, chain, and glass globe. It may be finished either in nickel or antique brass, but will always be supplied in nickel unless otherwise ordered. Glass pendants and appropriate glass cone globes, of a neat etched design, will be supplied when ordered.

This design is supplied only with the 16-ft. Lungren lamp.

252*u* Description.

Design F special.—This chandelier is a combination of a Lungren lamp, with five ordinary gas jets. It is supplied complete, ready to hang, with governor, by-pass cock, stop-cock, chain, and glass globe. It may be finished either in nickel or antique brass, but will always be supplied in nickel unless otherwise ordered. Glass pendants and appropriate glass cone globes, of a neat etched design, will be supplied when ordered.

This design is supplied with either the 12-ft. or 16-ft. Lungren lamp.

252*v* Description.

Design G special.—This chandelier is a combination of a Lungren lamp, with five ordinary gas jets. It is supplied complete, ready to hang, with governor, by-pass cock, stop-cock, chain, and glass globe. It may be finished either in nickel or antique brass, but will always be supplied in nickel unless otherwise ordered. Glass pendants and appropriate glass cone globes, of a neat etched design, will be supplied when ordered.

This design is supplied only with the 16-ft. Lungren lamp.

252*w* Description.

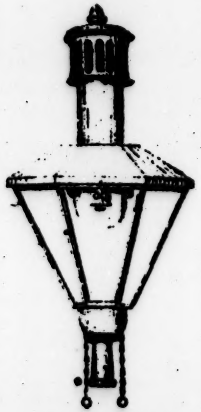
Post lantern.—These lanterns are supplied with a plate at the base, to which a socket may be attached. Sockets will be attached only when ordered, and the size of post on which the socket is to fit is given in order. The chimney and wind cap of lantern are made of sheet nickel, and the lamp is supplied complete, ready to hang in the lantern, with up-current governor, improved combined by-pass and stop cock, chains and glass globe, also opal glass for top, and clear glass of good quality for sides of lantern.

These lanterns are supplied with either the 8-ft., 12-ft., or 16-ft. Lungren lamps.

The governor of the lamp when used in a lantern should be so set as to burn a somewhat lower flame than when the lamp is used indoors. The lamp will burn about 20 per cent. less gas per hour when used in a lantern than when used indoors without lantern.

SPECIAL LIST.

Consumption pr. hour.	Price complete
8 feet,	$36.00
12 "	38 00
16 "	43 00



POST LANTERN.

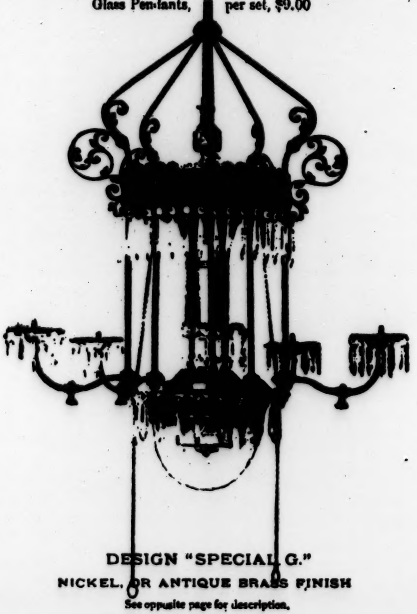
OPAL GLASS IN TOP.

See opposite page for description.

SPECIAL LIST.

Combined with.	Extreme length.	Spread.	Price complete without pendants.
16 ft., Lamp,	36 in.	30 in.	$46.00

Glass Pendants, per set, $9.00



DESIGN "SPECIAL G."

NICKEL, OR ANTIQUE BRASS FINISH

See opposite page for description.

252*x* Agencies.

The Siemens-Lungren Gas Illuminating Co., 77-79 Dearborn street, Chicago, Ills.
The Siemens-Lungren Gas Lamp Co., Baltimore and Hanover streets, Baltimore, Md.
The Siemens-Lungren Gas Lamp Co., 735 Broadway, New York city.
The Natural Gas Illuminating Co., room 28, Stevenson building, Pittsburgh, Pa.
Meyer, Marshall & Co., 147 Ellis street, San Francisco, Cal.
Waldo Bros., 88 Water street, Boston, Mass.

252*y* [On back cover.]

The only successful competitor

[Cut.]

of the electric light.

253 EXHIBIT B, T. A. F.

The Lungren Patent Regenerative Gas Lamp.

A system of burning gas whereby its illuminating power is increased from 300 to 400 per cent. without the expense, trouble, and annoyance resulting from the use of hydrocarbon enriching material.

Thirteen candle power per cubic foot of gas.

This result was obtained by the judges appointed by the Franklin Institute of Philadelphia at their Novelties exhibition in October, 1885. (See copy of tests and report on last page.)

The Lungren lamp embodies a simple method of burning gas, and presents many desirable features. The flame in the lamp being below the fixture, there is nothing in the way to cast a shadow or intercept the light; its full power is at once made available. It is simple in construction, easily manages, and can be fitted to ordinary supply pipes without alteration.

It is especially applicable for lighting offices, stores, factories, mills, show-windows, libraries, and all situations where an increased illumination is desired.

THE SIEMENS-LUNGREN CO.,
N. E. Cor. 21st St. & Washington Ave.,
Philadelphia.

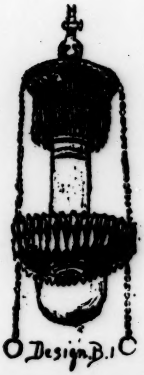
February 1st, 1887.

A Lungren lamp, consuming 12 cubic feet of gas per hour, will give as much light as 45 cubic feet consumed by the ordinary method.

A Lungren lamp, consuming 12 cubic feet of gas per hour, will give as much light as 45 cubic feet consumed by the ordinary method.

Design. A.

Design. B.



Design. B. 1

254 This is our plainest form of lamp. It is supplied complete, ready to hang in position, and includes governor, bye-pass cock, stop-cock, chains, and glass globe.

Consumption per hour.	Candle power at an angle 45°.	Extreme length.	Price complete.
8 cubic feet.	100	26 inches.	$25 00
12 " "	150	28 "	27 50
16 " "	200	31 "	32 50

This lamp is nickel-plated and fitted with nickel-plated trimmings and canopy, supplied complete, ready to hang in position, and includes governor, bye-pass cock, stop-cock, chains, and glass globe.

Consumption per hour.	Candle power at an angle 45°.	Extreme length.	Price complete.
8 cubic feet.	100	26 inches.	27 50
12 " "	150	28 "	30 00
16 " "	200	31 "	35 00

255 This lamp is same as design B, and includes glass pendants, supplied complete, ready to hang in position, with governor, bye-pass cock, stop-cock, chains, and glass globe.

Consumption per hour.	Candle power at angle 45°.	Extreme length.	Price complete.
8 cubic ft.	100	26 in.	$33 00
12 " "	150	28 "	36 00
16 " "	200	31 "	41 50

256 *Testimonials.*

Office East Portland Gas Co., East Portland, Oregon.

GENTLEMEN: In answer to yours of the 15th inst., would say that the 12-ft. Lungren lamp that you sent us a few weeks ago gives entire satisfaction. We hung it up in one of the largest grocery stores in this city, displaying five large Rochester oil lamps and giving them twice the amount of light that they formerly had.

Yours respectfully, GEO. KEATON, *Sep.*

Office Chas. E. Dole, Bangor, Maine.

GENTLEMEN: In reply to yours of the 15th inst., I have to say that we find the 12-foot Lungren lamp will do all you claim for it, and is the best high-power burner we have seen.

Yours truly, CHAS. E. DOLE.

Office Malden and Melrose G. L. Co., Malden, Mass.

GENTLEMEN: We have been lighting our office with one of your Lungren lamps, and will say that the brilliancy of the light is far superior to any gas light we have ever seen. It greatly exceeds our expectations. From several tests we have made we find it consumes less than twelve feet of gas per hour. Please ship us as soon as possible eight 12-ft., design B, and four 8-ft., design B.

Yours truly, G. B. HILL, *Treas.*

257 Office Geneva Gas Light Co., Geneva, N. Y.

GENTLEMEN: It is with pleasure that we record our high appreciation of the value of the Siemens-Lungren lamps.

Our customers are well pleased with those in use by them. For brilliancy of light and economy of consumption, we think they excel any other gas lamp we have seen. The lamp in our post office is frequently mistaken for an electric light.

Yours truly, SAM'L S. GRAVES, *Sup't.*

Office Circleville Gas Light Co., Circleville, Ohio.

GENTLEMEN: In reply to your inquiry about your lamps, I have to say they give great satisfaction. The light is the best for steadiness and purity we have been able to obtain in this town, from either oil, electricity, or gas. We have had six of your 12-ft. burners in operation about eight months now, with perfect satisfaction.

Yours truly, HOWARD JONES, *Pres't*

Office Plymouth Gas Works, Plymouth, Mass.

Siemens-Lungren Co.

GENTLEMEN: In answer to your inquiry as to the merits of the Lungren burners that we have bought of you in the past six months,

we are happy to be able to say that they possess aol the qualities you claim and are giving the best of satisfaction to all parties using them.

Yours truly, H. A. ATWOOD, *Sup't.*

258 Office North Adams Gas Light Co., North Adams, Mass.

Siemens-Lungren Co.

GENTLEMEN: Yours of the 15th ult. received. The Lungren lamp has been a success in North Adams. We have sold 18 during three months since the first one was exhibited, and as yet there has not been a single complaint. They need scarce any attention, if properly adjusted, and I believe them the perfection of gas burners.

Yours truly, FRANK S. RICHARDSON, *Treas.*

Office Warren Gas Light Co., Warren, O.

Siemens-Lungren Co.

GENTLEMEN: We are well pleased with the Lungren lamps. So far *as* they meet our expectations in every particular. Our customers, with whom we have placed them, are all pleased.

Yours truly, GEO. H. TAYLER, *Sec't'y.*

Office Lawrence Gas Co., Lawrence, Mass.

Siemens-Lungren Co.,

GENTLEMEN: In answer to yours of the 15th, I will say that we have some of your Lungren lamps in use here snd are very well pleased with their working.

Yours truly, C. J. R. HUMPHREYS, *Agent.*

259 Office Danbury Gas Light Co., Danbury, Conn.

Siemens-Lungren Co.

GENTLEMEN: We have placed eight of your 12-ft. B Lungren lamps, some of which have been running about three months. They are all giving satisfaction and appear to do all that is claimed for them.

Yours truly, G. E. COWPERTHWAITE, *Sup't.*

Office Williamsport Gas Light Co., Williamsport, Pa.

GENTLEMEN: We take pleasure in certifying to you the satisfaction given by the Lungren lamps which we have had in use in our city since the first introduction of them. The light is clear, brilliant, steady, and economical.

We cheerfully recommend them as the best burner we have seen in the market or been able to secure.

Yours truly, C. A. BYERS, *Sec't'y.*

Office Pittsfield Gas Light Co., Pittsfield, Mass.

GENTLEMEN: We have in use seven of your Lungren lights, and they are entirely satisfactory in their results. In proportion to the quantity of gas used, they give more light than any burner I know of.

Yours truly, W. R. PLUNKETT, *Tre-s.*

260 Office Plainfield Gas Light Company, Plainfield, N. J.

GENTLEMEN: In reply to your inquiry of 15th inst. would say that we have one Lungren lamp in operation here; it is a 12-foot lamp, but we find that it consumes only $10\frac{3}{4}$ feet of water gas, giving a very white and perfectly steady flame; it is the most satisfactory high-candle-power burner we have ever seen.

Yours truly, R. G. RUNKLE, *Treas.*

Office Westfield Gas Light Co., Westfield, Mass.

GENTLEMEN: Your 12-ft. burners in use by our customers are spoken of in the highest terms.

Yours truly, SAM'L FOWLER, *Treas.*

Office Seneca Falls & Waterloo G. L. Co., Seneca Falls, N. Y.

GENTLEMEN: The 12-ft. Lungren burner purchased of your company is giving good satisfaction. We are so well pleased with it that we wish you would ship us by freight one 12-ft. and one 16-foot.

Yours truly, W. PARRISH, *Sec'ty.*

261 The Siemens-Lungren Company received the only silver medals of the Franklin Institute awarded for gas-burners at the Novelties exhibition held at Philadelphia in October, 1885. The following abstracts are from the report of the committee on awards:

From committee report.

The Lungren inverted gas lamp owes its efficiency to the heating of the air and gas, which enter the flame by means of the waste heat which is leaving the lamp. Resembling in this respect the Siemens lamp, it has peculiarities which render it noticeable and increase its value to a marked degree.

The flame and the illumination *is* all below the structure of the lamp itself. There are no shadows, and the light thrown down from the suspended lamp is entirely unobstructed. The lamp is also of a form and structure which admits of its use in a variety of places where the Siemens lamp could not be used so conveniently. Finally, its efficiency is much higher than that of the Siemens lamp in small and medium lamps, such as are used in the lighting of offices, stores, and apartments of moderate dimensions. Its value for general illumination is for this reason greater.

The quality of the light for brilliancy, steadiness, and color is unsurpassed, and the lamp itself is simple in its construction and of a pleasing and agreeable design.

In measuring the light of the lamp your committee found it necessary to construct a photometer for the angular measurement. Horizontal measurements were made on the bar photometer
262 used in testing the Siemens lamp. The flame of this lamp being entirely below the lamp, however, the horizontal rays does not represent its efficiency in actual use.

Result of Measurement.

Tests made Nov. 5th, 1885; measurements at an angle of 45 degrees below the horizontal line; candle power of city gas equal to 17.69 candles.

Gas burned per hour (cubic ft.)	16.20
Candle power	197.16
Candle power per ft. of gas	12.17

Vertical measurement; candle power of city gas equal to 18.60 candles.

Gas burned per hour (cubic ft.)	16.00
Candle power	223.86
Candle power per ft. of gas	13.96

In view of the advantages of this lamp, as stated previously, and of its remarkable efficiency, as shown by these tests, we would recommend the award of the silver medal to this lamp, together with the diploma of the institute.

Furthermore, in view of the fact that the Siemens-Lungren Company have established the manufacture of the Siemens and Lungren lamps in a way to supply the demand in all the required sizes thereof and have added a new and valuable industry to those already established in this city, we would recommend the exhibit to the committee on science and arts of the Franklin Institute for further award.

THE SIEMENS–LUNGREN CO.,
N. E. Cor. 21st and Washington Ave., Philadelphia.

263 PLAINTIFF'S EXHIBIT 1, T. A. F.

PHILADELPHIA, *July 30th*, 1886.

Western Siemens-Lungren Co., 160 State street, Chicago, Ill., to the Siemens-Lungren Co., manufacturers of regenerative gas-burners; office & factory, N. E. cor. 21st and Washington Ave.

Orders ≠ 5168, ≠ 5169 by B. & O. express.
Terms, 30 days; acceptance from date.

Mark.		
5168		
C	50 8-ft. Lungrene lamps, "B," 11.50 net ----------	575 00
5169		
C	200 12-ft Lungrene lamps, "B," @ 12.50 net ------	2,500 00
		3,075 00
5%	----------	153 75
		2,921 25
7 boxes @ 1.10, 2 boxes @ 1.00, 32 boxes, 1.25; 2 boxes @ 1.10----------		51 90
16 barrels, .35----------		5 60
		$2,978 75

Shipped to Cincinnati Siemens-Lungren Gas Illum'g Co., Cincinnati, Ohio.
Special prices.

264 EXHIBIT C, T. A. F.

The Siemens-Lungren Co., manufacturers of regenerative gas-burners, N. E. corner 21st & Washington Ave.

Address all correspondence to the company.

PHILADELPHIA, *Oct. 28th*, 1889.

E. O. Eshelby, pres't Cincinnati Siemens-Lungren Gas Illuminating Co., Cincinnati, O.

DEAR SIR: We have your favor of 26th inst. and will ship you the articles ordered promptly, by express, as requested.

We note your remarks in regard to the solid metal burners and would like to supply you with the tube burners in place of the ones of which you complain, but do not think we should be called upon to make this exchange at our own expense upon lamps for which we have not yet been paid. The lamps to which you allude as having these solid burners were purchased by you from Chicago, and although we have been at great expense in our efforts to collect this account we have not yet succeeded in doing so. Your natural

proceeding would, of course, be to call upon the parties from whom you purchased the lamps to make this exchange, but you most likely are satisfied that this would be useless.

If you have any lamps which you purchased direct from us and which were supplied with the solid metal burners, please give us the date of such invoices and the number and size of burners required and we will be pleased to arrange to exchange them for you.

Yours truly, THE SIEMENS–LUNGREN CO.
H. A. BROGNARD, *Sec'y.*

265 EXHIBIT No. 1.

Page 28.

Copy.

CINCINNATI, *February* 11, 1888.

The Siemens-Lungren Gas Illuminating Co., 77 and 79 Dearborn street, Chicago, Ill.

GENTLEMEN: Some time ago I gave you an order for some asbestos rings, etc. Will you please send them to us as soon as possible, as we need them badly?

In answer to your communication under date of Feb. 9th, regarding the order of the Middletown Gas Co., we must insist upon your declining to sell any lamps whatsoever in the territory for which we have paid you a compensation for the sole and exclusive right.

Very respectfully,
(Signed) THE CINCINNATI SIEMENS–LUNGREN GAS ILL. CO.,
P'r E. O. ESHELBY, *President.*

266 EXHIBIT No. 2.

Page —.

CHICAGO, *March* 9, 1889.

Mr. E. O. Eshelby, Cin'ti, Ohio.

DEAR SIR: Your favor of the 7th inst. has come to hand in the absence of both our president and secretary. In reply, the writer would say that before our president left on Wednesday he signed a draft for $4,311.34, to be sent to you on the 10th inst., and if you will kindly protect this draft we will make you the allowance either on the next account or remit you upon his return, which will probably be next Tuesday or Wednesday. If you will kindly return us the one 16 and two 12-ft. lamps which are damaged, we will replace them with new ones and ship them along with the 50 12-ft. lamps which you order; which shipment we will make to you as soon as possible.

Very truly yours,

THE SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.
J. V. BAIRD, *Ass't Sec'y.*

267 EXHIBIT No 4.

Page 43.

The Westerm Siemens-Lungren Co., successor to the Siemens-Lungren Gas Illuminating Company.

CHICAGO, *Aug. 14th*, 1888.

The Cincinnati Siemens-Lungren Gas Illuminating Co., Cincinnati, Ohio, 158 Plum St.—Mr. E. O. Eshelby, pres't.

GENTLEMEN: We have been informed that our draft on you for $6,306.00 was returned unpaid because of no attention paid by your Co. to the bank notice. Will you please inform us why the draft was not honored?

Your early reply solicited.

Very truly yours,

L. J. WOLF,
President the Western Siemens-Lungren Co.

268 EXHIBIT No. 3.

Page 43.

AUG. 15TH, 1888.

The Siemens-Lungren Gas Illuminating Co., 160 State street, Chicago, Ill.

GENTLEMEN: In reply to yours of August 14th, I have to say that the rendition by you of an incorrect bill, copied with other incidental matters, has led to a more careful consideration of our mutual contract, privileges, and obligations, during which it has apparently been developed that we have not in all respects been the recipient of the contract advantages to which we are justly entitled. The writer is now extremely busy with other business engagements which cannot be entirely ignored and which will to some extent interfere with the mature and final consideration of the question involved, but which will receive his earliest practicable consideration. It is proper, however, to add that if our surmises prove correct no drafts will be honored until these questions are satisfactorily adjusted.

Very respectfully, E. O. ESHELBY, *President.*

269 EXHIBIT No. 5.

Page 45.

The Cincinnati Siemens-Lungren Gas Illuminating Co., 158 Plum street.

Copy.

CINCINNATI, *March 7th*, 1888.

The Siemens-Lungren Gas Illuminating Co., 79 Dearborn St., Chicago, Ills.

GENTLEMEN: Miss Folger reports to me this morning that in the last lot of 12 and 16 feet lamps received, one 16 and 2 12 feet lamps

were damaged and broken. Do you desire to have us return these to you, deducting the same from the amount of your statement, or will you replace them in the next shipment? We have furnished to Mr. Billingheimer 23 lamps, — which he stated you would allow us the credit of $3.00 for each lamp, or a total of $69.00. This will make a total due you on the 10th, deducting for the damaged lamps and amount credited to Billingheimer, of $4,197.00.

As to the credit upon the Middletown lamps, as stated before, we wish to leave that for future consideration. You may send us at once 50 12-ft. lamps.

Very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO.,
Per E. O. ESHELBY, *President.*

270 And afterwards, to wit, on the 12th day of April, A. D. 1890, the following assignment of error was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

No. —.

Supreme Court of the United States.

Error to the United States circuit court for the southern district of Ohio, western division.

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING CO., Plaintiff in Error,
vs.
THE WESTERN SIEMENS-LUNGREN COMPANY, Defendant in Error.

Assignment of Error and Prayer for Reversal.

At the October term, in the year of our Lord 1889, to wit, on the second Monday in the month of October, in the said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Cincinnati Siemens-Lungren Gas Illuminating Company, plaintiff in error, by its attorneys, Edward Dienst and John W. Warrington, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

That the court erred at the trial of said cause in admitting evidence offered by the defendant in error, to which the said plaintiff in error objected and excepted.

And in this, to wit: That the said court erred at the trial of said cause in rejecting evidence offered by the *plaintiff* in error, to which the said plaintiff in error objected and excepted.

271 And in this, to wit: That the said court erred at the trial of said cause in its charge to the jury.

And in this, to wit: That the court below erred in overruling the motion of the plaintiff in error, the defendant below, to set aside

the verdict and for a new trial for the grounds in said motion set forth; to which action of the court the plaintiff in error then and there excepted.

And in this, to wit: That the said court erred in rendering judgment upon said verdict in favor of the defendant in error, the plaintiff below, when by the law of the land the said judgment should have been in favor of the plaintiff in error, the defendant below; to which action of the court the plaintiff in error, the defendant below, then and there excepted; and the said The Cincinnati Siemens-Lungren Gas Illuminating Co. prays that the sa-d *the said* judgment aforesaid may be revérsed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by reason and occasion of said judgment.

THE CINCINNATI SIEMENS-LUNGREN GAS ILLU. CO.,
By EDWARD DIENST AND
JOHN W. WARRINGTON, *Its Attorneys.*

272 UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record in said court.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 18th day of June, A. D. 1890.

B. R. COWEN, *Clerk,*
By JANIE W. COWEN, *Deputy.*

273 [Endorsed:] No. 4226. Supreme Court of the United States. The Cincinnati Siemens-Lungren Gas Illuminating Company, plaintiff in error, *vs.* The Western Siemens-Lungren Company, def't in error. Assignments of error and prayer for reversal. Filed April 12th, 1890. B. R. Cowen, clerk. Edward Dienst, John W. Warrington, att'ys for pl't'ff in error.

274 No. —.

Supreme Court of the United States.

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY, Plaintiff in Error, *vs.* THE WESTERN SIEMENS-LUNGREN COMPANY, Defendant in Error.	Error to the United States Circuit Court for the Southern District of Ohio, Western Division.

Assignments of Error and Prayer for Reversal.

At the October term, in the year of our Lord 1889, to wit, on the second Monday in the month of October, in the said term, before

the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Cincinnati Siemens-Lungren Gas Illuminating Company, plaintiff in error, by its attorneys, Edward Dienst and John W. Warrington, and says that in the records and proceedings aforesaid there is manifest error in this, to wit:

That the court erred at the trial of said cause in admitting evidence offered by the defendant in error, to which the said plaintiff in error objected and excepted.

And in this, to wit: That the said court erred at the trial of said cause in rejecting evidence offered by the *plaintiff* in error, to which the said plaintiff in error objected and excepted.

And in this, to wit: That the said court erred at the trial of said cause in its charge to the jury.

And in this, to wit: That the court below erred in overruling the motion of the plaintiff in error, the defendant below, to
275 set aside the verdict and for a new trial for the grounds in said motion set forth; to which action of the court the plaintiff in error then and there excepted.

And in this, to wit: That the said court erred in rendering judgment upon said verdict in favor of the defendant in error, the plaintiff below, when by the law of the land the said judgment should have been in favor of the plaintiff in error, the defendant below; to which action of the court the plaintiff in error, the defendant below, then and there excepted; and the said The Cincinnati Siemens-Lungren Gas Illuminating Company prays that the said judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by reason and occasion of said judgment.

THE CINCINNATI SIEMENS-LUNGREN
GAS ILLUMINATING COMPANY,
By EDWARD DIENST AND
JOHN W. WARRINGTON, *Its Att'ys.*

276 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Western Siemens-Lungren Company and the Cincinatti Siemens-Lungren Gas Illuminating Company, a corporation, a manifest error hath happened, to the great damage of the said The Cincinnati Siemens-Lungren Gas Illuminating Company, a corporation, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-

cerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of April, 1890, in the year of our Lord one thousand eight hundred and ninety.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

277 [Endorsed:] United States circuit court, southern dist. of Ohio, western division. No. 4226. The Western Siemens-Lungren Co. *vs.* The Cin. Siemens-Lungren Gas Ill. Co. Writ of error. Filed April 1st, 1890. B. R. Cowen, clerk.

278 THE UNITED STATES OF AMERICA, *ss:*

To the Western Siemens-Lungren Company, a corporation—Kramer & Kramer, att'ys—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The Cincinnati Siemens-Lungren Gas Illuminating Company, a corporation, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 1st day of April, in the year of our Lord one thousand eight hundred and ninety.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEO. R. SAGE,
District Judge of the United States within and for the Southern District of Ohio, Sitting & Holding Circuit Court, There Being No Circuit Judge or Associate Justice within the District.

279 [Endorsed:] United States circuit court, southern dist. of Ohio, western division. No. 4226. The Western Siemens-Lungren Company *vs.* The Cin'ti Siemens-Lungren Gas Ill. Co. Citation to defendant in error. Filed April 9th, 1890. B. R. Cowen, clerk.

THE UNITED STATES OF AMERICA, }
Southern District of Ohio. }

Received this writ at Cincinnati, Ohio, April 1st, A. D. 1890, and on the 8th day of April, A. D. 1890, at Cincinnati, Ohio, executed the same by delivering to Kramer and Kramer, attorneys for the Western Siemens-Lungren Company, a true copy of this writ, having the endorsements thereon.

J. H. SIMMONS,
U. S. Marshal, S. D. O.,
By JNO. W. HOOK, *Deputy.*

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Endorsed on cover: Case No. 14,169. S. Ohio C. C. U. S. No. 193. The Cincinnati Siemens-Lungren Gas Illuminating Company, plaintiff in error, *vs.* The Western Siemens-Lungren Company. Filed September 25, 1890.

Office Supreme Court U. S.
FILED.
DEC 18 1893
JAMES H. McKENNEY,
CLERK.

Robert Clarke & Co., Printers.] [December, 1893.

Supreme Court of the United States.

OCTOBER TERM, 1893. TERM NO. 193.

The Cincinnati Siemens-Lungren Gas Illuminating Company,

Plaintiff in Error,

vs.

The Western Siemens-Lungren Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. WARRINGTON,
Counsel for Plaintiff in Error.

Robert Clarke & Co., Printers. [*December, 1893.*

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vs.
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Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was begun February 25, 1889, in the Circuit Court of the United States, Western Division of the Southern District of Ohio. (R. 1.) The parties to the action are corporations; the plaintiff below was organized and doing business in Illinois, and the defendant below was organized and doing business in Ohio. The action is upon an account for $6,922.64, the items of which will be seen in Exhibit A of the petition. (R. 2, 3.) The defendant below responded to the action by an answer and cross-petition. The first defense of the answer shows that on November 9, 1887, a com-

pany known as The Siemens-Lungren Illuminating Company of Chicago entered into a written contract with certain named individuals, whereby the company assigned to the individuals "the sole and exclusive right and privilege of selling, placing, and operating throughout the counties of Hamilton, Butler, and Montgomery, in the State of Ohio, of all the patented regenerative or other gas lamps, appliances, or fixtures which were then or might thereafter be made, owned, or controlled by the Siemens-Lungren Company of Philadelphia, Pa." (R. 5.) The company covenanted that during the entire period covered by the licenses and patents then owned by the Siemens-Lungren Company, or which might thereafter be acquired on improvements and reissues, it would sell exclusively to said individuals for use in said counties "all the burners, fixtures, and appliances made by the Siemens-Lungren Company, and would not knowingly sell or permit other parties to sell for use in said territory any burners, lamps, or goods made, owned, or controlled by said Siemens-Lungren Company, but would, upon the contrary to the best of its ability, prevent the sale of any such articles for use within the territory;" that it agreed to sell to said individuals "the most approved form of regenerative lamp which might now or thereafter be made by said Siemens-Lungren Company, of Philadelphia, at the prices named in said contract; that it would sell any new sizes or styles of lamps, fixtures, or appliances at the same proportionate rate of discount from the then or future manufacturers' list prices, . . . and that in case the Philadelphia company should at any time in the future make any reduction in the price of goods furnished to or through the said Siemens-Lungren Gas Illuminating Company, said last named company should make a corresponding reduction to" said individuals. (R. 6.) Said company "guaranteed the life service of any lamps furnished to be five years, exclusive of any globes broken or other damage done through careless handling,

and that it would defray the expenses of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named." Said company further agreed to defend said individuals "against all alleged infringements of letters patent granted to other parties, and to promptly defend the letters patent held and owned by said Siemens-Lungren Company of Philadelphia, and to protect said parties of the second part from infringements by other parties, in the exclusive and unrestricted use of the rights, franchises, and privileges conveyed by said contract, provided said first party were duly notified and given exclusive control of any litigation which may ensue." (R. 6.)

Said defense further states that immediately after the execution of said agreement the same was assigned to defendant below by the individuals before referred to as parties to the contract, and that defendant "has ever since fully performed and kept all the covenants and agreements on its part to be kept and performed." Said defense further shows that one L. J. Wolf, as secretary, and one Joseph Wolf, as president of said Siemens-Lungren Gas Illuminating Company, of Chicago, claimed to have organized the company, plaintiff below, and to have assigned the agreement aforesaid to plaintiff below, but that defendant below refused to enter into any new contract with plaintiff below. (R. 6) In other words, defendant below refused to recognize plaintiff below as having any interest in said written contract. Said defense further states that all the lamps and fixtures purchased by defendant below, including those stated in the account sued on, were furnished under said written contract. The defense admits that defendant below received under said contract the lamps and fixtures stated in the account, but avers "that the prices stated therein are largely in excess of the prices which it should be charged under said contract, said Philadelphia company having made a a reduction in the price of such lamps and fixtures, but the

exact amount of which reduction defendant has not been able to ascertain." (R. 7.)

The second defense, adopting the allegations of the first defense so far as the same is a statement of the contract, and its assignment, states that a portion of the lamps furnished to it under said contract by the Chicago company, party to said written contract, are an infringement of the letters patent held by the Philadelphia company; and that the latter has instituted suit against defendant below in the court in which this action was then pending, alleging such infringement, asking for an injunction, for an account of profits and for damages. The defense also contains a general denial. (R. 7.)

By way of cross-petition defendant below sought to recover:

(1) On account of sales claimed to have been made by the Siemens-Lungren Illuminating Company, of Chicago—not plaintiff below, but the corporate party to said written contract—of "large quantities of the said patented lamps, appliances and fixtures" in the counties aforesaid in the towns of Dayton, Hamilton and Middletown, whereby damages were suffered to the extent of $6,000. (R. 8.)

(2) For failure of the said Chicago company to make reductions in its prices of lamps, etc., sold to defendant below, corresponding to reductions made by the Philadelphia company to said Chicago company, alleging damages in that behalf to be $2,250. (R. 8.)

(3) For failure of said Chicago company to observe its covenant "to keep said lamps in good and serviceable condition during the said period of five years from the date of said contract," alleging its damages in that regard to be $1,600. (R. 9.)

(4) On account of sales by said Chicago company to defendant below of a large number of lamps purporting to be said patented lamps furnished by said Philadelphia company, but which were in fact an infringement thereof and of such

poor quality as to be unfit for use; that defendant was compelled to retire from use ninety-two of the lamps which "were useless and worthless property;" that defendant paid $2,000 for said lamps, "and that by reason of its being compelled to remove the said lamps and the consequent loss of business, it has been damaged in the further sum of $1,000." (R. 9.)

(5) For failure of said Chicago company to keep its covenant requiring it to furnish defendant "with the most approved form of said regenerative lamp then or which might thereafter be made by said Philadelphia company," in this, that it sent defendant below from time to time "a large number of old style lamps, when the Philadelphia company was manufacturing and selling an improved lamp with a 'by-pass lever;'" that after long delays defendant below was furnished improved lamps in exchange for the old, but that by reason of the cost of changing the same, the cost of freightage and handling, it suffered a loss of $1,000.

(6) For failure of said Chicago company to keep its covenant to furnish defendant below with lamps "in lots of 300 or less, within 30 days after receipt of such order for delivery," to the damage of defendant below in the sum of $10,000. (R. 10.)

The contractual basis of the defenses and causes of action thus extracted from the answer and cross-petition will be found at pp. 11 to 13 of the Record.

Demurrers were filed to the second defense and the fifth cause of action of the answer and cross-petition (R. 13); but were afterward withdrawn and reply filed instead. (R. 15.)

The two replies are set forth at pp. 14 and 15 of the Record. The first one admits the making of the contract aforesaid, dated November 9, 1887, between the Siemens-Lungren Illuminating Company of Chicago, and certain individuals as stated in the answer; and also that the contract was afterward assigned by said individuals to defendant below. (R. 14.) It in terms also admits that the same contract

was assigned by "said Siemens-Lungren Illuminating Company to the plaintiff," but we find no allegation in the answer which is open to such an admission. The other portions of the replies are mere denials (R. 14–15).

Later an amendment was made to the cross-petition claiming that the Chicago company—not the plaintiff below but the corporate party to said contract—failed to keep its covenant to furnish the defendant with the most improved form of regenerating lamp which then or might thereafter be made by said Philadelphia company, furnishing defendant below "with the 250 lamps sued upon in plaintiff's account, said lamps having solid metal burners instead of tube burners, the solid metal burners rendering imperfect service; said plaintiff has refused and failed to exchange the said 250 lamps for others with the tube burners, and that by reason of such failure defendant will be compelled to make such exchange with the parent or Philadelphia company at an additional cost to this defendant and to its damage in the sum of $750." (R. 16–17.)

Upon these issues, the case came on for trial in the Circuit Court, February 6, 1890, before the district judge and a jury (R. 17); on February 10, 1890, the jury, under instructions, returned a general verdict for plaintiff below in the sum of $5,752.34, together with a special verdict for repairs, at dates and in sums there mentioned for the aggregate amount of $736.55 (R. 18).

A motion for a new trial was filed by defendant below, and on February 15, 1890, the court ordered a remittitur of $127.90, which was consented to by plaintiff below, and thereupon judgment was entered upon the verdict subject to such remittitur in the sum of $6,138.32, being the amount of the verdict and interest from February 4, 1890 (R. 19).

A bill of exceptions containing all the evidence was subsequently allowed (R. 22 *et seq.*) To reverse said judgment upon the record aforesaid this proceeding was brought, and is now presented in this court. The errors assigned are:

(1) Admitting evidence offered by the defendant in error to which the said plaintiff in error objected and excepted.

(2) Rejecting evidence offered by the plaintiff in error to which the said plaintiff in error objected and excepted.

(3) Error at the trial in the charge to the jury.

(4) Overruling motion to set aside verdict and for new trial for the grounds set forth therein.

(5) Rendering judgment upon the verdict in favor of defendant in error when by the law of the land it should have been in favor of plaintiff in error (R. 150).

PROPOSITIONS.

1. There was no contractual relation created between the defendant in error and plaintiff in error by the delivery and receipt of the articles represented by the account on which this action is founded; because, while they were furnished by plaintiff in error, they were ordered by defendant in error from the Siemens-Lungren Gas Illuminating Company, of Chicago, under the written contract of November 9, 1887 (Ex. A. R. 11), without the knowledge and consent of plaintiff in error respecting the alleged assignment of said contract by said Chicago company to the plaintiff in error. Therefore the action was not maintainable by defendant in error.

2. Even if the action could be maintained by defendant in error, it would be subject to all the terms and conditions of the contract of November 9, 1887 (Ex. A, R. 11), and subject to all the rights and liabilities existing between the original parties to that contract.

3. The measure of damages for breach of a contract of license to vend and use patented articles within specified territory, when such breach consists of sales by the licenser himself of the patented articles within such territory, is not limited

to the mere difference between the prices at which the licenser agrees to furnish the articles to the licensee and the prices at which the licenser wrongfully sells them to strangers within such territory.

Whatever may be the true measure of damages in such cases, the defendant in error was liable to plaintiff in error, not only for sales by its assignor within such territory, but also for sales therein by the parent or Philadelphia company.

4. Where damages are recoverable, as for instance, upon breach of the lincenser's obligation under such a contract to keep the patented articles in repair for a specified time, the recovery should be allowed for the whole time specified, and not merely up to the date of the trial.

5. Where a licensee under a patent covering merchantable articles contracts with a sub-licensee for certain territory, to furnish the most approved pattern of such articles, and instead of doing so furnishes a spurious, infringing and worthless article made by himself, to the substantial injury of the sub-licensee, the latter is not restricted to the recovery of mere nominal damages, simply because he has not returned or offered to return such worthless articles. Nor can the recovery be so restricted on the theory that no proof has been offered tending to show actual damages, where the overwhelming, if not the undisputed, evidence is that the articles are worthless.

6. Where a licensee agrees to furnish to its sub-licensee "the most approved form of regenerative lamps now, or which may hereafter be made" by another company, and after delivering lamps it is discovered that they are not of the most approved form; and where, in order to make them so, another patented device is needed as a substitute for one of the parts, which, in the absence of default of such licensee, could be furnished by it free of cost, it is error to refuse to allow the sub-licensee to show what it is required to pay in consequence of such licensee's default in order to obtain the required device.

ARGUMENT.

I.

In support of our first proposition, we submit the following:

In the charge to the jury, the court below said: "The first defense in the answer need not be considered by you." (R. 54.)

Near the close of the first defense of the answer, after stating that an assignment of the contract of November 7, 1887, was claimed to have been made to defendant in error, it is said: "and said parties repeatedly attempted to have the defendant enter into a new contract with said plaintiff company, but which defendant has refused to do." (R. 7.)

On July 3, 1888, a letter seems to have been sent to plaintiff in error by defendant in error, signed by L. J. Wolf, president (who, we shall see, was also secretary of the original contracting company), stating that defendant in error would assume the contract "exactly as at present existing with the old company," etc. (R. 103.)

On July 16, 1888, however, plaintiff in error gave an order to the old company, ignoring the notice of July 3d from the new company. (R. 104.) On the following day, defendant in error acknowledged receipt of the order of the previous day upon the old company, and says it "was handed to our company, as the former company has practically ceased doing business and has no lamps on hand. We shall therefore treat the order as though it had been sent directly to us, in harmony with the notice previously sent you, that the undersigned has control of the territory in which you are operating." (R. 105.) Other orders were meanwhile given by plaintiff in error, but invariably to the old company or its officers.

On August 7th, a letter was sent by plaintiff in error to the old company at Chicago, reciting that, at a meeting of

the directors of the Cincinnati company, held August 5th, the communication in regard to the old company's disposal to defendant in error of its franchises and contracts, and desiring the assent of the Cincinnati company, was considered and approval thereof unanimously declined, and stating that the Cincinnati company would not "in any manner become a party to any such transfer or assignment." (R. 109.) In response to this, the old Chicago company addressed a letter to the Cincinnati company, dated August 8th, saying: "In reply to yours of August 7th, would say that, since you decline for the reasons stated in your letter 'to become a party to any such transfer or assignment,' there is nothing for us to do but to allow the contracts at present existing between you and ourselves to remain in force." (R. 109.)

In all the letters and communications from the Cincinnati company, it will be found that it studiously avoided addressing or having any thing to do with the new company, the defendant in error. (R. 101 to 117, 154 to 157.)

In the letter sent by defendant in error, dated October 11, 1888, to the Cincinnati company, the plan adopted by the controllers of defendant in error to compel a recognition by plaintiff in error of the assignment is very clearly revealed: "Replying to yours September 25th, the writer would say you are undoubtedly indebted to the Western Siemens-Lungren Company, for goods shipped you by that company, billed you by that company, and accepted by you after you had received notice that the goods belonged to that company. *The writer happens to represent that company as president of the corporation, and also happens to represent the Siemens-Lungren Gas Illuminating Company as its secretary.* . . . I will also state that the Western Siemens-Lungren Company is disposed to wait a reasonable time for the 'differences to be adjusted and questions to be stated' between your company and the Siemens-Lungren Gas Illuminating Company before endeavoring to enforce a collection of its claim against your company," etc. (R. 117.) (Italics ours.)

Does this not clearly evince a purpose at the time to evade existing liabilities of the old Chicago company to the Cincinnati company? Are we wrong in inferring that the design of the Chicago people then was to resort to the plan of forming a new company and assigning to it so as to escape liability for breaches of the contract by the old Chicago company? No reason is disclosed by the record as to why the old company should not have continued in business. The parties in control of the old and new Chicago companies, so far as those parties appear, seem to be identical. We recognize the general rules touching the right to assign contracts and the liability implied from receiving and holding goods from another person than the one from whom ordered. But where one has a written contract with another under which orders and deliveries have been made for a long time, and certain continuing obligations remain as to the time within which future deliveries shall be made, or as to repairs of the articles delivered, or as to protection to the vendee in his exclusive use of the articles, is the court prepared to apply these general rules of assignment and acceptance as against both the protest of the vendee and his continued efforts to protect himself and his rights against the other contracting party?

This contract contains a grant of certain specified territory, and the assignment of "the sole and exclusive right and privilege of selling, placing and operating throughout" such territory "all the patented regenerative or other gas lamps and appliances or fixtures which are now, *or may hereafter* be made, owned or controlled by the said The Siemens-Lungren Company." (R. 11.) It also contains a covenant "that during the entire period covered by the licenses and patents now owned by the said Siemens-Lungren Company, or which may hereafter be acquired on improvements and reissues, the said Siemens-Lungren Gas Illuminating Company will sell exclusively to said parties of the second part for use in the counties before named, all the burners, fixtures and appliances made

by said Siemens-Lungren Company, and will not knowingly sell, or permit other parties to sell, for use in said territory, any burners, lamps or goods made, owned or controlled by said Siemens-Lungren Company, but will, upon the contrary, to the best of their ability, prevent the sale of any such articles for use within the territory named." (Id.) It contains a provision for making reductions in the stipulated prices corresponding to reductions made by the parent company from time to time. It obligates the contracting company to deliver lamps in lots of three hundred or less within thirty days "after receipt of such order for delivery." The Chicago company "guarantees the life-service of any lamps furnished to be five (5) years, . . . and that it will defray the expense of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition *during the period named*." It obligates that company, after the expiration of such period, to give a further guaranty "for an additional period of five years upon being paid the additional sum of $3.00 for each lamp thus guaranteed."

The company agrees that it "will defend the parties of the second part against all alleged infringements of letters patent granted to other parties, and will promptly defend the letters patent held and owned by said Siemens-Lungren Company, and protect the parties of the second part from infringement by other parties in the exclusive and unrestrained use of the rights, franchises, and privileges hereby conveyed." (Ibid.)

Under the facts shown and the contractual provisions just alluded to, we submit that there is no rational escape in this case from the principles laid down by this court in *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, 127 U. S. 379. In the course of the opinion in that case, Mr. Justice Gray, at p. 387, said:

"But every one has a right to select and determine with whom he will contract, and can not have another person

thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' . . . The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. 'Rights arising out of contract can not be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.' Pollock on Contracts (4th ed.), 425."

The contract in question in the Arkansas company's case was one to deliver ten thousand tons of lead ore; the ore to delivered at the rate of fifty tons a day. The price was to be ascertained and paid as often as one hundred tons of ore were delivered and assayed, and, if the parties could not agree, then it was to be fixed by an umpire.

As it seems to us, the continuing obligations succeeding any particular delivery of articles under the contract in question here, are more numerous and of a more complicated character than existed under the contract there involved. The classification of the authorities on the subject, made at the close of the opinion in *Arkansas Valley Smelting Co.* v. *Belden Mining Co.*, distinguishes the case at bar from the general rules on the subject, and fairly places it within the decision in that case. If we are right in this, the defendant in error was not "the real party in interest" within the meaning of section 4993 of the Revised Statutes of Ohio, and could not rightfully maintain the action for that reason.

II.

Even if the action was maintainable by defendant in error, it was subject to all the terms and conditions of the contract of November 9, 1887 (R. 11); and subject to all the rights and liabilities existing between the original parties to the contract.

Section 4993 of the Revised Statutes of Ohio, before cited, provides that "when a party asks that he may recover by virtue of an assignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

We presume that if the assignment from the old Chicago company to the new one is to be treated as having been assented to by the Cincinnati company, it will be an implied consent. There is no express consent. There was express protest against the assignment and refusal to consent to it. All this has been fully shown. Such implied consent can not be worked out except subject to the statement contained in the letter of defendant in error, dated July 3, 1888, in which it is stated: "And the new company will assume your contract exactly as at present existing with the old company." (R. 103.) Moreover, L. J. Wolf, who as we have seen was an officer in both the old and new companies, stated in his deposition that the articles embraced in the account sued on here were furnished under the contract of November 9, 1887. (R. 71.) Joseph Wolf, president of the new Chicago company, stated this even more strongly in his deposition. R. 84.) The court below having ruled out the first defense, the case was tried to the jury upon the theory that defendant in error was liable under the contract precisely the same as its assignor. Hence we assume that our claim to this extent will be conceded by our adversaries in the present argument.

III.

In determining the soundness or not of our third proposition, we ask the careful consideration of the nature and object of the contract in question. It concerns patented articles. The right exclusively to vend and use them is limited in time. The profits made on them are due as much to the monopoly that the law and the contract sanction in the licensee, as to the inherent merits of the articles themselves. The theory upon which protection for a limited time is given

to the exclusive use of patented articles is that patentees and those standing in their rights may be remunerated for the exercise of inventive genius and the expenditure of money in applying its productions. It is the policy of the law to extend this protection to all who acquire rights under the government patents. In this case, the Philadelphia company—called the parent company—owned the letters patent. It gave a license to the original Chicago company. The latter company granted a sub-license to the Cincinnati company for the three Ohio counties named in the contract. The language of that contract was appropriate for transferring to the licensee the exclusive privilege of vending and using the patented lamps in every part of each of those counties. One of the most obvious and important considerations moving to the licensee was that the licenser should not knowingly sell or permit others to sell, and that it should defend and protect the licensee against every one infringing within that territory. The consideration moving to the immediate licenser company was the price which it chose to fix for the sale of its lamps to the licensee. The immediate licenser had to deal only with the parent company, and once acquiring territory had plenary power to fix the price, as it did in this instance, to gratify its own ideas of profit. It therefore could well afford to guarantee, as it did, against sales by itself and others, and against all infringements within the prescribed territory. It is true that the licensee had like power to fix its prices within that territory; but that was the only way it could reap profits sufficient to justify it in paying the prices exacted by its licenser.

Now, what must have been in contemplation of such contracting parties when making mutual covenants for the licensee to pay a large price and the licenser to guarantee against sales and infringements? What must have been within their contemplation as respects sales by the licenser *itself*, or by the parent company? The manifest object of

such a contract is to enable the licensee to fix its own prices and enjoy exclusive sales within the licensed territory. A choice of words is not necessary either to conceal or disclose a design to avoid competition. The law authorized such a purpose and the parties plainly sought to accomplish it. An invasion of that territory by any one in the line of licenser, under the letters patent in question, was a deliberate attempt to usurp the profits involved in its own sales; also to destroy not only all of the licensee's profits, but to render impossible his chance of building up a business in the immediate district invaded. A moment's reflection will satisfy any one that this is true. As soon as persons learn that the articles can be bought at lower prices than those asked by the licensee, it is evident that they will become discouraged in the use of the articles, even though the licenser afterward withdraw as a competitor. Can it be that the only damages recoverable in such a case is the difference between the prices at which the licenser agrees to furnish the articles to the licensee and the prices at which the licenser wrongfully sells them to strangers? Obviously such damages can not equal the licensee's injuries. Such damages can not have been all that was contemplated by the parties to the contract at the time it was made.

More than this, such a breach of contract has in it the very essence of malice or reckless disregard of the rights of others. The only excuse made by any agent of the Chicago company was that it did not know that the city of Middletown was within the licensed territory. This was said in a letter (R. 103); it was not said in testimony. Such a statement is incredible. It is not even accompanied by any statement that the Chicago company had a square foot of unsold territory within Ohio. The company was both legally and morally bound to know that so important a place as Middletown was within one of the counties which it had sold. Again, how is it credible that the Chicago company's own

licenser—the parent company—should not have known that it too was making sales in this very town of Middletown within the territory previously sold by it to the Chicago company? How is it credible that the Chicago company would not have known that the parent company was making those sales? The difficulty of proving such knowledge is apparent. Men who would commit such a breach of contract would not hesitate to conceal their acts or deny their knowledge. The admitted fact, however, that both companies thus invaded a portion of the Cincinnati company's territory ought to be strong evidence that they both knew they were selling within territory, which they had themselves previously sold, and that each knew of the other's conduct. True, two of the officers of the old Chicago company said in their depositions they did not know of these sales by the parent company. (R. 73, 86.) But under such a contract were they not bound to know? They were receiving lamps constantly from the parent company and in constant dealings with it.

But whatever may be ruled upon this point, there remains the principle, for which we are contending, as against the original Chicago company. The manner in which an officer of that company treated the subject of its breach of the contract shows that his moral sense of obligation was decidedly blunted.

"Q. Did I not understand you to say that after the Cincinnati company protested against the sale by you of any more lamps in Middletown you immediately discontinued the sale?

A. As soon as we learned that the Cincinnati company *objected* to our selling lamps in Middletown we refused to ship any more lamps there—received letters from Middletown and referred the Middletown company to Cincinnati." (R. 74.)

He was apparently waiting for objection. This negatives ignorance.

Further evidence of the total disregard for contractual obligation which the agencies of both the Chicago corpora-

tions displayed, will be seen in the proved forfeiture of both their contracts with the parent company. The president of the latter company stated, in regard to its original contract with Wolf, which was afterward assigned as before shown to the first Chicago company, that "the contract was forfeited for non-fulfillment of its terms, but I do not remember the dates." (R. 121.)

"Q. State whether or not the contract which was afterward entered into between your company and the western company or second company of Chicago, has been declared forfeited by your company, and if so, state the reasons and give, if you can, the date?

A. That has also been abrogated for failure to comply with its terms, but I can not give the exact date of it." (Id.)

Mr. Clapp, president and secretary of the Middletown Gas Company, testified that on

"November 11, 1887, we purchased two lamps of the Siemers-Lungren Company of Chicago; December 12th, we purchased two lamps of the same company; January 16, 1888, we purchased two lamps of the same company; January 28, 1888, we purchased three lamps of the same company; that is all the lamps we purchased of the Chicago company. In November, 1888, we purchased eight lamps of the Philadelphia company.

Q. That is after this suit was brought? That is November, 1889, isn't it?

A. No, sir; that was in 1888. December, 1888, we purchased twenty-four lamps of the Philadelphia company; August, 1889, we purchased fifty-three lamps; September, 1889, twenty-four; and December, 1889, four lamps; that is all. . . . (R. 23.)

Q. What is the total?

A. That is 122 lamps altogether." (R. 24.)

At the close of the evidence offered in the court below by plaintiff in error, counsel for defendant in error moved to strike from the Record the testimony of Mr. Clapp, with the

exception of that part which refers to the nine lamps. The motion was objected to by counsel for plaintiff in error but granted by the court, to which exception was duly taken. (R. 52.)

In the course of its charge to the jury, the court below said, in respect to the measure of damages for these sales of lamps, "that the only legitimate damage, and the only damage that you can consider in that regard is the profit which the Chicago company actually made upon the sale of each one of those lamps, which, I think, according to the testimony, is conceded to be $4.83 per lamp." (R., bot. p. 55.) Due exception was taken to this. (R., top p. 56.) On the latter page of the record appears the court's disposition of the sales of lamps in Middletown by the parent company, to which due exception was also taken. Thus it is seen that plaintiff in error was restricted in its recovery, not only to the nine lamps sold in Middletown by the Chicago company, but to the mere difference between the price at which the Chicago company agreed to sell to the Cincinnati company and the price at which the Chicago company sold its lamps in Middletown. Our insistence was that all the lamps sold by both companies should be considered, and that the difference between the price at which the Cincinnati company was entitled to buy the lamps and the price at which it rented and sold lamps should be the measure. (R. 35, 55–6).

The case relied on by the court below, as we understand, to sustain its measure of damages, was *Seymour* v. *McCormick*, 16 How. 480. We respectfully submit that the case is not applicable. That was a case brought for the infringement of a patent right. The declaration alleged in substance that McCormick was the inventor of certain new and useful improvements in reaping machines, for which he held letters patent; that he was the inventor of certain improvements upon a patented machine for which he also held letters patent; and charged that defendant had made three hundred

reaping machines which infringed the inventions and improvements in question.' The second count of the declaration alleged in substance that McCormick was the inventor of certain other improvements upon his reaping machine for which he held letters patent, and that defendant manufactured and constructed three hundred machines embracing the principles of the last-named inventions and improvements. The defense was a plea of not guilty. A portion of the charge of the court below is stated in the opinion of this court, and the points of complaint made by the plaintiff in error are also stated. These seem to be that the court below instructed the jury that it was "a legal presumption that if defendant had not made and sold machines, all persons who bought the defendant's machines would necessarily have been compelled to go to the patentee and purchase his machines;" and that "the measure of damages for infringing a patented improvement on a machine in public use is the same as if the defendant had pirated the whole machine and every improvement on it previously made, and as a consequence that the plaintiff below had a right to recover as great damages for the infringement of the patent in his second count as if he had proceeded on both counts of his declaration and shown the infringement of all the patents claimed, and that in consequence of these instructions they have been amerced in damages" to an enormous sum (pp. 487–8). This court held these instructions to be erroneous in that particular case. After stating several rules of damages which had been in force from statutes and otherwise, the court, at bot. p. 488, said:

"Experience had shown the very great injustice of a horizontal rule equally affecting all cases, without regard to their peculiar merits. The defendant who acted in ignorance or good faith, claiming under a junior patent, was made liable to the same penalty with the wanton and malicious pirate. This rule was manifestly unjust. For there is no

good reason why taking a man's property in an invention should be trebly punished, while the measure of damages as to other property is single and actual damages. It is true, where the injury is wanton or malicious, a jury may inflict vindictive or exemplary damages, not to recompense the plaintiff, but to punish the defendant."

After stating the limit fixed by the patent act of 1836 to be the assessment of "actual damages," and the committing to the discretion and judgment of the Court the power to inflict vindictive or punitive damages, it is further said:

"It must be apparent to the most superficial observer of the immense variety of patents issued every day, that there can not, in the nature of things, be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted."

So we maintain here that the peculiar circumstances of the breach now in dispute must depend on the peculiar nature of this particular case. We suggest, too, that the rule of damages for an infringement by one who may honestly believe that he is not an infringer, is not and ought not to be the criterion for the damages which should be allowed as against a licenser who willfully violates his contract by making sales within the licensed territory. Such a person is in effect a trespasser, and ought to be treated accordingly. The principle applicable is more correctly stated, we submit, in decisions like that in *Gilbert* v. *Kennedy*, 22 Mich. 117, where the plaintiff had been deprived of the profitable use of his own pasture for his own stock by the tortious conduct of the defendant in turning in his cattle with the plaintiff's, and in consequence plaintiff's cattle suffered, and he was allowed as damages not merely the value of the pasturage, but the growth and increase in weight which the cattle might reasonably have been expected to attain but for the over-

burdening of the pasture caused by the trespass. In the course of the opinion, it was said:

"To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which can not be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence, and invite depredation. Such is not and can not be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result." (Id. 130.) . . . "Whatever of uncertainty there may be in this mode of estimating damages, is an uncertainty caused by defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; and this not only when the trespass is willful and wanton, without a claim of right, but whenever the property, though claimed by him, is in the possession of another, and he, taking the law into his own hands, makes himself judge in his own cause, and, knowing his right to be disputed, seizes upon the the property without a judicial trial of his rights."

See also *Allison* v. *Chandler*, 11 Mich. 542, 554.

In *Burrell* v. *N. Y. & S. S. S. Co.*, 14 Mich., Cooley, J., announcing the opinion of the court respecting profits of a labor contract, approving of the decision last cited, said: "The damages which the law seeks to award to the party wronged was such as to compensate him for the injuries sustained."

Burckhardt v. *Burckhardt*, 42 Ohio St. 474, is analogous in principle. The parties to the case had been partners. One bought the interest of the other, "together with the good will of the business heretofore done by said firm," and agreed that he would not thereafter do business in the firm name, but reserved the right to carry on his own business in his own name or under any name other than that of the old firm. The seller having committed a breach of the contract, the court said in its fourth syllabus:

"Owing to the peculiar character of property known as the good will of a business, which depends upon the contingencies of trade, that degree of certainty as to proof of damages is, in the nature of things, not attainable, as in most breaches of contract. All that is required is that degree of certainty which the nature of the case will admit."

Wakeman v. *Wheeler & W. S. M. Co.*, 101 N. Y. 205, involved a contract by which defendant agreed that if plaintiff should succeed in selling fifty of defendant's sewing machines to one firm or person in Mexico, for every fifty machines so sold they should have the sole agency for the sale of said machines in that locality, and defendant agreed to furnish the machines. Plaintiff's agent made two sales of fifty machines to persons in Mexico under an agreement that the purchasers should be the sole agents for the sale of the machines. Defendant filled one of the orders and refused to fill further orders. At the bottom of page 208, it is said:

"In his charge to the jury, the judge held as matter of law, that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and the plaintiff's profits have been shown to be $4 on a machine, their recovery was thus limited to $204."

At bottom p. 209, Earl, J., said:

"A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits can not be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It

is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach."

Again, at bottom p. 215:

"It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right under their agreement to establish agencies for the sale of defendant's machines anywhere in Mexico, where they could sell fifty machines. An agency, when thus established, was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or, in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited."

The judgment was reversed.

Peltz v. *Eichele*, 62 Mo. 171, involved a contract for the sale of an entire match factory and stock in trade, "together with good-will, proprietary stamp, trade-marks, brands, and the use of certain names." Afterward, the defendant erected a new factory within a short distance of the one he sold to plaintiffs, and at once engaged in the manufacture and sale of matches, using one of the names embraced in the contract of sale. Afterward the plaintiffs sold their factory and stock to the defendant, and began their action against defendant for a breach of the covenants of the first contract, and alleged that the defendant influenced patrons of the old firm to become patrons and customers of the new, thereby

injuring and destroying the good-will of the business so sold to them. In the course of its analysis of the measure of damages, at p. 180, the court said:

"What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal measure of damages in this case."

This is the very opposite of the rule adopted by the court below.

Treat v. *Hiles*, 81 Wis. 280.
Jenkins v. *Temples*, 39 Ga. 655.

We should have cited earlier one of the exceptions stated to the general rule, as announced in the syllabus of *Howard* v. *Stillwell and Bierce M'f'g Co.*, 139 U. S. 199, in which it is said of the right to recover anticipated profits, that "where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it is entered into, they are so recoverable."

As said before, the peculiar nature and objects of this contract, the circumstances under which it was made and violated, warrant us in urging that plaintiff in error should be allowed to recover at least the profits which it was accustomed to earn and might fairly be presumed to have gained had the various breaches involved in the sales proved to have been made in Middletown, not been committed. This is equally true as regards the sales made in Middletown by the parent or Philadelphia company.

IV.

We shall now discuss our fourth proposition. The court below limited the recovery for breach of the licenser's obligation under the contract to keep the patented articles in repair for a specified time, to the expenses incurred in that regard up to the date of the trial, refusing to allow recovery beyond that time.

During the trial, while the president of the plaintiff in error was on the witness stand, the following occurred:

"Q. I will ask you to state whether or not, as the lamp grows older and remains in service longer, there is an increase in the cost and in the repairs?

[Question objected to by counsel for plaintiff. Objection sustained. Exception reserved by counsel for defendant.]

[Counsel for defendant expect to prove by witness that the cost and expense of keeping the lamps in repair would increase as the lamps grew older and remained in service longer.]" (R. 37.)

Near the bottom of p. 56 of the Record, the court said:

"The next defense rests upon the clause of the contract relating to repairs, and that clause is as follows: 'That the said Siemens-Lungren Gas Illuminating Company guarantees the life service of any lamps furnished to be five years, exclusive of any globes broken or other damage done through careless handling, and that it will defray the expense of any incidental repairs which may be necessary to keep said lamps in good and serviceable condition during the period named, and that, upon the expiration of said period of five years, they will, if the party of the second part so desire, guarantee that the said lamps will be guaranteed for an additional period of five years upon being paid the additional sum of $3 for each lamp thus guaranteed.'"

After the court had stated the substance of the evidence which was allowed to be offered, showing the cost of repairs up to the time of the trial, and submitting the respective claims in that behalf to the jury, it was requested by the defendant "to charge in this connection that the jury should take into consideration the probable repairs to said lamps for the balance of the period of five years, as guaranteed by said contract." The court refused to so charge; "to which refusal defendant excepted." (R. 57.)

When this cause was tried, the undisputed evidence showed that the contracts of both the Chicago companies with the parent or Philadelphia company were terminated. Of the first company's contract, the president of the Philadelphia company said: "The contract was forfeited for nonfulfillment of its terms, but I do not remember the dates."

Of the contract of the new Chicago company, the same witness said: "That has also been abrogated for failure to comply with its terms, but I can not give the exact date of it." (R. 121.)

According to the record, there was no right at the time of the trial, and no right can be presumed as to the future, in either of the Chicago companies, to demand of the parent company any of the patented articles which were or may be necessary to make repairs of the lamps of plaintiff in error. Neither of those companies could then, nor can they now, perform their covenant for repairs, so far at least as replacing any of the necessary patented devices are concerned. It will not do to say that they could partially escape their covenant. It will not do to say that they could purchase patented devises of the parent company, because that company was not at the time of the trial and is not now bound to furnish them. For all practical purposes the Chicago companies must be treated as having ceased doing this kind of business. For, with their contracts rescinded or otherwise terminated, they were without authority to do any thing in

regard to these patented articles. The contract between the first Chicago company and plaintiff in error bears date November 9, 1887. The verdict was rendered February 10, 1890. That contract therefore had more than two years to run. Besides, the articles furnished were guaranteed a service-life of five years. Thus the effect of the breach upon plaintiff in error was substantial. Plaintiff in error was at the time of the trial and still is bound to look to the parent company and pay such prices as it may exact for obtaining the necessary devices to keep its lamps in repair. It follows that the contract, as well as the action for breach of its covenant to repair, was at the time of the trial an entirety; and that the breach was in effect total.

Bowe v. *Minn. Milk Co.*, 44 Minn. 460. In that case defendant agreed to purchase and receive of plaintiff all the milk produced by his cows between certain dates, and to furnish all cans necessary to transport it. Defendant corporation was dissolved, after which it neither did nor attempted to do any business. Plaintiff brought an action for damages for breach of the contract, the breach alluded to being the failure to furnish cans for and receive the milk during certain months. In January, 1889, judgment was recovered on the merits. In April, 1889, the plaintiff brought a second action for damages for a similar breach of the same contract during the months of July, August and September. *Held:*

"That, the contract being an entire one, although by its terms to continue for a year, and the breach being total, because of defendant's disability to perform by reason of its dissolution, a single right of action immediately accrued to plaintiff to recover all his damages, present and prospective, for the loss of his contract, and the recovery in the first action was a bar to the second."

Ennis v. *Buckeye Pub. Co.*, 44 Minn. 105, was an action for breach of a written contract by which plaintiffs agreed

to do the press work for defendant, and to fold and paste its certain semi-monthly publication for a period of two years. Defendant agreed to continue the publication during that period, to publish at least 50,000 copies at each issue, to deliver at the time specified the material for each issue, and to pay plaintiff for each 1,000 copies printed and delivered by them. Plaintiff alleged performance until a time stated, and continued readiness to perform since then, but that defendant then refused and still refuses to allow them to do so, etc. In the opinion, it is said:

"When the contract is entire and the breach total, the plaintiff may recover his whole damages, present and prospective, for the loss of his contract, in a single action" (p. 106).

Erie & P. R. R. Co. v. *Douthet*, 88 Pa. St. 243, was an action for breach of contract to give defendant a pass over the railroad for himself and his family for his lifetime. The company refused to comply with the agreement. In the opinion it is said:

"The pass being the principal feature of the contract, was therefore made its chief subject, for it was the document to be furnished as the evidence of the plaintiff's right. Hence we see no other rule to be applied to the case but damages for the refusal of the parties as the only cause of action, and this being single, to be compensated by such damages, as a pass for life for himself and family would be worth. It is true, it is difficult to estimate its value because of two uncertainties, one the length of life, and the other the number of passages he and his family would probably demand. Still this uncertainty, like many others, must be made to approximate certainty as closely as the nature of the case will admit of" (p. 246).

Amerman v. *Dean*, 132 N. Y. 355, 360–1.

Erie & Pittsburg R. R. Co. v. *Johnson*, 101 Pa. St. 555.

I. B. & W. R. R. v. *Koons*, 105 Ind. 507.

V.

Our fifth proposition arises upon the evidence offered under the allegations of the fourth cause of action stated in the answer and cross-petition. (R. 9.) It is there alleged in substance that, owing to the construction and quality of certain lamps furnished plaintiff in error, ninety-two had to be removed because they were useless and worthless. William Smith, who was engaged in putting up, taking down, repairing and cleaning lamps, testified that he knew of all of these lamps except one, which was sent to Philadelphia. (R. 24.) He further testified:

"Q. State to the court and jury what the character of the lamp was, what the action of the lamp was, how it acted when burning, and all about it?

"A. Well, it was not made like the other lamp; there was an air passage in it that made the lamp flicker and smoke, and people would not have them, so we had to take them down and replace them with better lamps." (R. 24.)

On the following page of the record quite a number of the names of customers who could not use the lamps and from whose places they were removed, are given. The witness also described the difficulty of obtaining new and proper lamps with which to replace these defective lamps, but that the company made the changes as rapidly as possible. (R. 28.)

Mr. Eshelby, president of plaintiff in error, testifies substantially the same as Mr. Smith in regard to these lamps, the complaints about them, and the necessity for removing them. (R. 31.) On the same page he shows that his discovery of the imperfect construction of these lamps, and that they were an infringement of the other lamps, was due to information given by the engineer of the parent company, who came to Cincinnati on account of a defective device on a cer-

tain lot of lamps which that company had sent to the Cincinnati company, upon the order of the old Chicago company. On page 32 of the record Mr. Eshelby describes graphically the difficulties encountered in trying to make use of these lamps. At bottom of that page, this testimony came out:

"Q. How many lamps are now in use, of these spurious lamps?

A. I should say ten or twelve.

Q. The remainder are all in your possession?

A. Yes, sir, and have been for a year and a half; since we retired them.

Q. How many lamps were there of that character?

A. One hundred.

Q. What was the amount that you paid for them?

A. $1900. That, of course, without freight and drayage."

Mr. Eshelby explained why the lamps were not returned to the Chicago company:

"Q. Now, will you please explain why you did not send back these lamps as soon as you discovered they were defective?

Yes, sir. Because Mr. Stein brought suit against us for an infringement of the patent and ordered them in, and told us to hold them, and because negotiations with the Chicago company had ceased." (R. 46.)

It will be remembered that Mr. Stein was president of the parent company.

Counsel for defendant in error themselves called William Smith in rebuttal and showed by him the difference in construction between this spurious lamp and the genuine lamp (R. 52). It there appears that a spurious lamp was made in two castings and screwed together, while the genuine lamp was made in one casting. It was through the opening between the two castings of the spurious lamp that the air passed and rendered it useless.

Mr. Stein, president of the Philadelphia company, speaking of these lamps, testified thus:

"I have made several visits to Cincinnati since the date of the contract, November 9, 1887, and during one of my visits my attention was called to some lamps which were in the possession of the Cincinnati company, that upon examination we discovered were lamps not manufactured by our company, but were apparently made by some one in imitation of the lamps we were supplying. I so informed Mr. Eshelby." (R. 120.)

"Q. State whether or not you directed the Cincinnati company to retire from use all that class of lamps which you on investigation denounced as being manufactured by others than yourselves.

A. When my attention was called to the lamps by Mr. Eshelby he also stated that they had been giving them a great deal of trouble, and that they were a detriment to the business. I told him that in my opinion the best thing he could do would be to entirely discard their use." (R. 121.)

In the cross-examination of Mr. Stein enough was developed to show that the Chicago company itself manufactured these lamps.

"Q. I will ask you if it is not a fact that the Chicago company had a right under certain conditions to manufacture lamps themselves, to be used in their own territory?

A. They had that right under certain conditions.

Q. Is it not a fact that they claimed that these conditions existed at *the time that they manufactured these so-called spurious lamps?*

A. They never made that claim to us, nor did we ever know that they had made these lamps until it was accidentally discovered by us.

Q. As matter of fact, did not the conditions exist under which the Chicago people had a right to manufacture lamps?

A. No, sir.

Q. You are quite positive of that, are you?

A. Quite positive; yes, sir." (R. 123.)

See also testimony of Mr. Brognard, secretary and treas-

urer of the Philadelphia company, on the subject of these spurious lamps. He described the spurious lamp which Mr. Smith stated was sent from Cincinnati to Philadelphia (R., p. 134). It will not be disputed that the Philadelphia company actually brought suit against the plaintiff in error for infringement on account of its use of these spurious lamps which were furnished to it by the Chicago company. (R. 85.)

Thus, it is made plain that the Chicago company itself constructed lamps and surreptitiously foisted one hundred of them upon plaintiff in error; that they were useless and worthless, and an infringement of the parent company's lamp; and that plaintiff in error has actually suffered a loss of at least $1900 in the actual cost of said lamps, not to speak of freightage, drayage, cost of repairs, changing lamps, and the like. No testimony was offered to rebut the evidence establishing these facts. Particular attention is now drawn to the portion of the charge of the court below, which relates to this subject. (R., bot. p. 57 to mid. p. 59.)

We submit that the theory of law entertained by the learned court was palpably erroneous when applied to the case in hand. It was assumed that, in spite of the circumstances above shown, the plaintiff in error was bound to return the lamps to the Chicago company, or to prove their value. But even upon this theory there was no warrant for denying damages altogether, because the evidence all tended to show that the lamps were absolutely worthless. Their value then was nothing. It followed that damages should have been allowed to the extent of their cost. This was not affected by the circumstances mentioned by the court that twelve of the lamps were sold at $35 apiece, because the undisputed testimony of Mr. Eshelby was that the purchasers of those lamps were not satisfied, and were "simply holding them until we can replace them with good lamps." (R. 47.) Apart from this, the testimony stood unchallenged that the

remaining eighty-eight lamps were both "useless and worthless." Yet the court closed its charge in this regard thus: "So that, if I am correct in my statement of the testimony, I can not see that you can do any thing more than award nominal damages—that is to say, in the aggregate from $1 to $5." (R. 59.) Exception was taken to this. (Id).

Is it possible that in all this, there was nothing to which plaintiff in error was entitled to have submitted to the jury?

Poulton v. *Lattimore*, 9 B. & C. 259, was an action by a vendor to recover the price of seed warranted to be good, new growing seed, but which turned out to be wholly unproductive; and the vendee, proving that the seed was worthless, was allowed to make his defense for the whole amount of the price without returning or offering to return the seed.

In *Vincent* v. *Leland*, 100 Mass. 432, it was held that "the right of a buyer of goods to sue upon the seller's special warranty of their quality, accrues immediately on failure of the warranty, without returning the goods or giving any notice to the seller."

Brown v. *Weldon*, 99 Mo. 564, was an action on a note given for the purchase price of chattels bought for a particular purpose. The defense was failure of consideration. In the course of the opinion it was said:

"That, while in an action upon a promissory note given for the purchase price of a chattel bought for a particular purpose, whether upon an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article, or offer to return it, or to rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of a failure of consideration. Yet, if he retains the article and does not offer to return it, *and such article is not wholly worthless*, such plea can avail him only so far as to defeat a recovery on the note to the extent of the difference between the value of the article, had it been such as it was represented to be, and its value such as it is shown really to be" (pp. 568-9). [Italics ours.]

Manufacturing Co. v. *Wood*, 84 Mich. 452, recognizes the principle that if an article is absolutely worthless, it is not necessary to return or tender it to the vendor, in order to recover back the purchase price, or set it off in an action in assumpsit brought by the vendor.

Hege v. *Newsom*, 96 Ind. 426, was an action on account for saw-logs sold and delivered. At p. 431 of the opinion it was said:

"There was evidence that a portion of the lumber—about two thousand feet—made by the appellants from the logs was not merchantable, and was not fit for lumber, and that it was cut up by the appellants and used as fuel by them in their mill.

"It is well settled that the measure of damages for a breach of warranty as to the quality of a chattel sold is the difference between the actual value of the article at the time of sale and the value it would have had if it had been as warranted, *and that the buyer need not return or offer to return the article in order to sustain an action for the breach of warranty, or to set it up as a defense or as a counter-claim in an action for the recovery of the price.*" (Italics ours.)

Suppose the lumber in that case, which was not merchantable, "and was not fit for lumber," had been proved to be worthless; suppose it had not been used as fuel, which implied some value: does not the clear logic of the decision show that the measure of damages would have been the price paid? The lamps in question here were proved to be "useless and worthless;" they were placed in the cellar of plaintiff in error and applied to no purpose whatever. Every part of each lamp was so connected with the castings made by the Chicago company that no separate use, and no use whatever, could be made of any portion of any one of the lamps. It would, therefore, have been an idle ceremony to have inquired into their value. The very fact that defendant in error offered no evidence to contradict the proved useless

and worthless character of the lamps in the positions where they were placed for lighting purposes, ought to be conclusive. If defendant in error could have shown that the lamps had any practical or substantial value for any use whatever, why did they not offer evidence to that effect? At any rate, was not the question of whether the lamps had any practical value, a question for the jury?

We do not wish to be understood as contending against the rule in regard to chattels of admitted value, which disallows the purchaser to retain and use the property without accounting at least for its value. But this is not our case.

VI.

But little need be said in support of our sixth proposition. It arises upon the facts relating to the seventh cause of action found in amendment to the cross-petition. (R. 16.) It is there in substance alleged that although the Chicago company agreed to furnish plaintiff in error with the most approved form of lamp made by the Philadelphia company, it furnished 250 lamps embraced in the account sued on, with "solid metal burners instead of tube burners, the solid metal burners rendering imperfect service," to the damage of the plaintiff in error in the sum of $750. In the testimony of Mr. Brognard, secretary and treasurer of the Philadelphia company, this appears:

"Q. The 250 lamps spoken of as being shipped direct from the Philadelphia company to Cincinnati, were shipped upon the order of the western company, were they not?

A. Yes, sir.

Q. You have had occasion to correspond with the Cincinnati company with regard to the condition of those burners of those lamps?

[Objected to. Objection sustained. Defendant's counsel excepts.]

A. I think there were brass burners supplied with the lamps.

[Letter shown witness.]

Q. I ask you to refer to this letter and state whether it is not a letter sent by you?

[Objected to. Objection sustained. Defendant's counsel excepts.]

A. Yes, sir; it is dated October 28, 1889.

Q. I will ask you to attach it to your deposition.

[Plaintiff objects. Objection sustained. Defendant's counsel excepts.]

"Letter marked 'Exhibit C,' and attached hereto." (R. 136.)

The letter so attached and ruled out is found at bottom page 154 of the record. It is from the Philadelphia company to the Cincinnati company. It states in substance that the former company would be willing to exchange tube burners for solid burners, *if the lamps had been bought directly from that company*. It in effect refused to do so, because they were not so bought. It states, "your natural proceeding would, of course, be to call upon the parties from whom you purchased the lamps to make this exchange, but you most likely are satisfied that this would be useless."

The same witness testified further:

"Q. State what the price would be in exchange, which you would require per lamp in order to make the exchange?

[Objected to. Objection sustained. Defendant's counsel excepts.]

A. $3 per lamp for the twelve-foot size." (Bot. p. 136.)

Mr. Stein, president of the Philadelphia company, in his deposition taken long before the trial below, said:

"Q. It is a fact, is it not, that any differences which formerly existed between your company and either of the Chicago companies or Mr. Wolf have been compromised and adjusted?

A. I believe they all have; yes, sir." (R. 126.)

Mr. Brogniard, referring to the 250 lamps in question here, at bottom of page 132 and top of page 133 of the record, was asked this question and answered it as follows:

"Q. You may state whether the Western Siemens-Lungren Company was charged by you with the amount of said bill, and whether it is not a fact that you sued them to compel its payment, which suit has recently been compromised?

A. The bill was charged as stated in the question, and sued for and compromised."

Thus it is shown that, notwithstanding the annulment of the contracts between the parent company and the Chicago companies, as before shown, all differences between these companies touching liability on account of articles purchased and delivered, including the very articles sued on in this case, had been compromised and settled long before the trial was had in the court below.

It was proved that the tube burner was in use by the plaintiff in error before these lamps were received with the solid metal burners, and that they gave perfect satisfaction. In Mr. Smith's testimony it appeared:

"*Q.* This tube burner is the first burner you had in stock, is it?

A. Yes, sir.

. . . . . .

Q. Then this solid metal burner was subsequently received?

A. Yes, sir." (R. 27.)

Mr. Eshelby testified:

"Now, you may state, with reference to the shipment of this last lot of 250 lamps, what class of burners was shipped with that lamp?

A. What is called a solid metal burner.

Q. State what burner had been shipped with the lamps prior to that time?

A. What is called a tub burner." (R. 33.)

See also his cross-examination at page 48 of the record.

Now, let it be borne in mind that the tube burner which was necessary to bring this lot of 250 lamps within the covenant for lamps of the most approved form, was a patented device. The parent company was the only one having them for sale and was authorized by law to fix their price, as it did, at $3 apiece. The question then is, whether the covenant of the Chicago company was not broken when it failed to furnish the tube burner in place of the solid burner. It appears plainly that the Philadelphia company would make the exchange free of charge in favor of every one that kept its contract with that company. The Chicago company did not keep its contract with that company. It was unable to secure the exchange for that reason. By its default, then, plaintiff in error did not receive the full benefit of all the covenants of its contract. The court below, however, ruled out all evidence as to the cost to which plaintiff in error was subject to, before it could secure the exchange of burners. The theory upon which this ruling was made was that the plaintiff in error had not actually made the exchange and incurred the expense. Is this the true test?

The court below also fell into an error of fact. It assumed that the compromise made between the Philadelphia and Chicago companies removed all difficulty between them, and consequently that there would be "no objection on the part of the Philadelphia company to exchanging the burners upon application." We can find no evidence to sustain this. The court limited recovery upon this claim to nominal damages. (Id.)

As it seems to us, the principles of law applicable to such a state of facts are plain. The cost of the article was

regulated by the owner of the patent. The article was not a subject of competition. It had no market value except the single price so fixed. No question of reasonable value or cost could arise.

But it was ruled that recovery could not be had for any thing, because the change had not been made and the price paid. We submit that this is in conflict with the authorities already cited and commented on, which relate to a total breach of contract. Whatever claim of damages plaintiff in error possessed, as it seems to us, it was bound to set forth, and was entitled to recover in the action brought to recover the price of the lamps. Another and familiar class of authorities with which the court's charge seems to us to be in conflict is that where a chattel is purchased under a contract of express or implied warranty, in case of breach the vendee may, in an action to recover the price, recoup the amount of his damages.

Respectfully submitted.

J. W. WARRINGTON,

Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893. TERM NO. 193.

The Cincinnati Siemens-Lungren Gas Illuminating Company,

Plaintiff in Error.

vs.

The Western Siemens-Lungren Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

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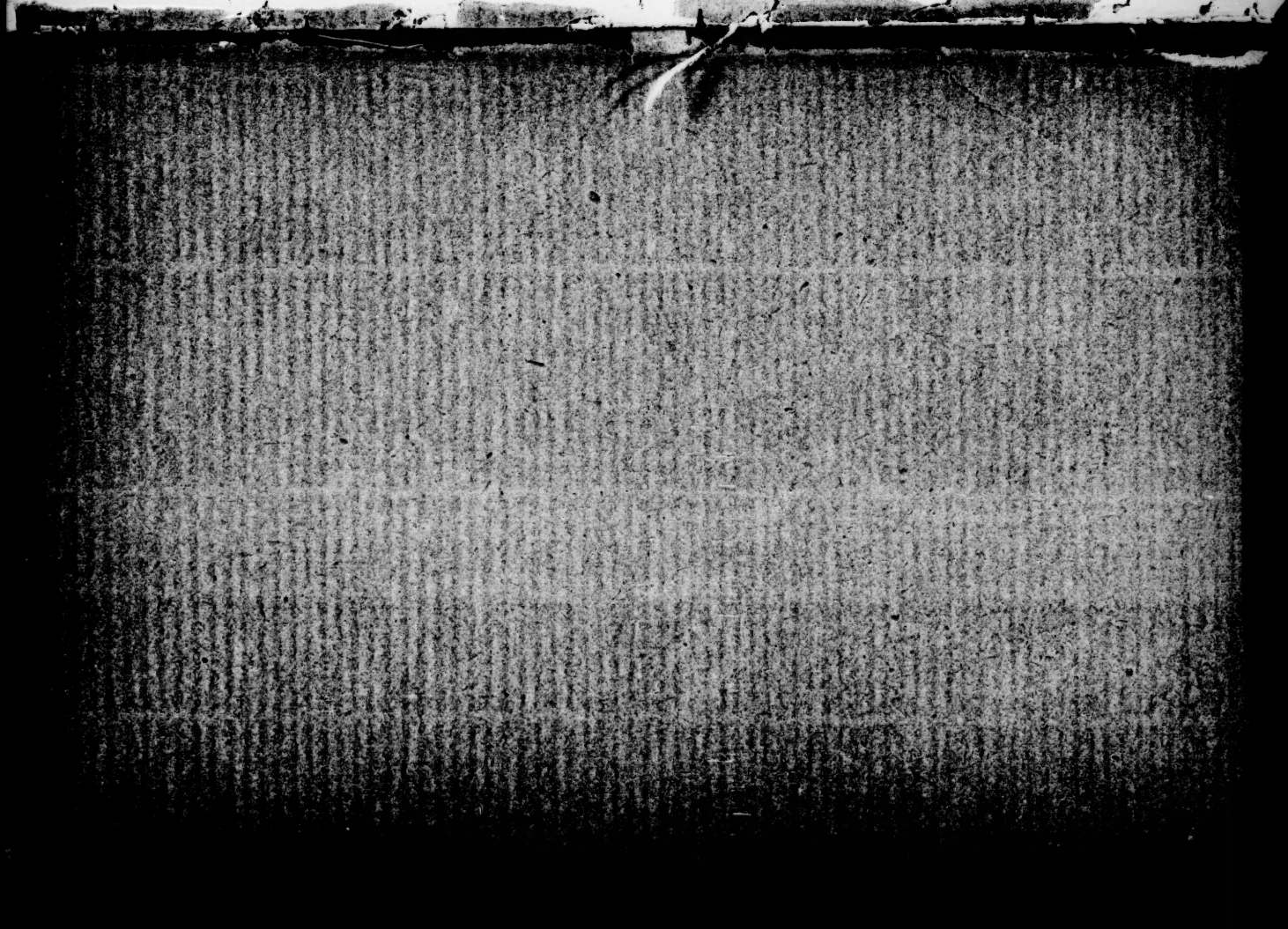
COURT INDEX PUBLISHING COMPANY, 283 MAIN ST., CINCINNATI, OHIO, 1893.



SUPREME COURT OF THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY,
Plaintiff in Error,
vs.
THE WESTERN SIEMENS-LUNGREN COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

THE CASE.

The action below was upon an account for goods sold and delivered by the defendant in error to the plaintiff in error in 1888.

Prior to 1888 the Siemens-Lungren Company, a corporation under the laws of Pennsylvania, was the owner of certain letters patent for regenerative gas lamps, and in April, 1887, said corporation entered into a contract with one Joseph Wolf, of Chicago, wherein said Siemens-Lungren Company granted to said Wolf, or his assigns, the exclusive right to use and vend appliances, covered by said

letters patent, throughout sundry territory, including the state of Ohio, with the exception of the counties of Mahoning, Columbiana, Jefferson and Belmont.

Record, p. 6.

Wolf immediately assigned said contract to the Siemens-Lungren Gas Illuminating Company, a corporation under the laws of Illinois.

Record, p. 98.

On November 9, 1887, the Siemens-Lungren Gas Illuminating Company entered into a contract with A. Hickenlooper and others, reciting the former contract and granting to the said A. Hickenlooper and others, or their assigns, the exclusive right to use and vend the appliances, covered by said letters patent, in the counties of Hamilton, Butler and Montgomery, in the state of Ohio, upon certain prices, terms and conditions fixed by said contract.

Record, pp. 98, 99, 100.

This contract was immediately assigned by A. Hickenlooper and others to the plaintiff in error.

Record, p. 6.

In April, 1888, one L. J. Wolf organized a corporation called the Western Siemens-Lungren Company (defendant in error), and this corporation purchased from the Siemens-Lungren Gas Illuminating Company of Chicago all of its assets, including all contracts, for the sum of $12,000.

Record, p. 64.

This transaction was duly authorized and assented to by the Siemens-Lungren Company of Philadelphia, (the parent company).

Record, pp. 65, 93.

On July 3, 1888, the plaintiff in error was duly notified of the fact that all assets and contracts of the Siemens-Lungren Gas Illuminating Company had been purchased by the defendant in error, and that the rights of the plain-

tiff in error, under their contract, as to territory, price, etc., would be fully protected.

Record, Ex. Q., p. 103.

Subsequent to July 3d the defendant in error furnished to the plaintiff in error the goods and merchandise which form the subject of the account in suit.

Record, pp. 2, 3.

It is undisputed that the various items were furnished by the defendant in error to the plaintiff in error at the prices fixed by the contract; that the plaintiff in error received them from defendant in error; that they have never been in any way tendered back, and that no part of the account has been paid.

To an ordinary action at law upon the account there was filed below an answer in two counts, and a cross-petition containing six alleged counter-claims aggregating $23,850.

Record, pp. 5, 6, 7, 8, 9, 10.

At the trial the jury returned a verdict for the plaintiff below, which was followed by a judgment for $6,138.32.

Record, p. 19.

To reverse this judgment is the object of these proceedings in error.

It is claimed by counsel for plaintiff in error that the rights and liabilities of the parties are to be measured by the terms and conditions of the contract between the Siemens-Lungren Gas Illuminating Company and A. Hickenlooper et al., subsequently assigned by Hickenlooper et al. to the plaintiff in error, and which is the same contract purchased from the Siemens-Lungren Gas Illuminating Company by the defendant in error, as stated above.

See brief of plaintiff in error, proposition

I.

To this claim we assent. It therefore becomes material to know what the terms and conditions of said contract were.

In substance, they were as follows:

Record, pp. 98, 99, 100.

1st. The Siemens-Lungren Gas Illuminating Company assigned and conveyed to A. Hickenlooper et al. the sole and exclusive right of selling and operating the devices covered by the said letters patent throughout the counties agreed to sell said appliances exclusively to said A. Hickenlooper et al., or assigns, during the period covered by said licenses and patents, for use in the territory specified; and further agreed to "not *knowingly* sell, or permit other parties to sell, for use in said territory, any burners, lamps, or goods made, owned or controlled by said Siemens-Lungren Company, but will, upon the contrary, *to the best of their ability*, prevent the sale of any such articles for use within the territory named to any others than the parties of the second part, their successors and assigns." (Italics ours).

2d. The Siemens-Lungren Gas Illuminating Company agreed to sell to said A. Hickenlooper et al., or assigns, at certain prices fixed, "the most approved form of regenerative lamps now or which may hereafter be made by said Siemens-Lungren Company;" and further agreed:

"In case the Siemens-Lungren Company shall at any time in the future make any reduction in the price of goods furnished to or through the Siemens-Lungren Gas Illuminating Company, the last-named company shall make a corresponding reduction to the parties of the second part."

4th. The Siemens-Lungren Gas Illuminating Company guaranteed the life service of said lamps to be five years, and agreed to defray the cost of incidental repairs necessary to keep said lamps in good condition during said period.

5th. In consideration of these and certain other covenants, immaterial so far as this case is concerned, A. Hickenlooper et al. agreed to organize a corporation, pay a cash

consideration, and use their best efforts to introduce the lamps, etc., throughout the territory named, paying for said lamps, etc., according to the prices mentioned in the contract, on the tenth of each month.

It is by reason of the alleged breach of the covenants in said contract to be kept and performed by the Siemens-Lungren Gas Illuminating Company, that the various grounds of counter-claim alleged in the cross-petition arise.

For convenience, we take up the several propositions stated by counsel for plaintiff in error, and comment upon the evidence applicable to each in its respective order.

ARGUMENT.

I.

The first proposition announced by our adversaries is as follows:

1. "There was no contractual relation created between the defendant in error and plaintiff in error by the delivery and receipt of the articles represented by the account on which this action is founded; because, while they were furnished by plaintiff in error, they were ordered by defendant in error from the Siemens-Lungren Gas Illuminating Company of Chicago, under the written contract of November 9, 1887, (Ex. A. R., 11), without the knowledge or consent of plaintiff in error respecting the alleged assignment of said contract by said Chicago company to the plaintiff in error. Therefore the action was not maintainable by defendant in error."

This is a proposition of fact rather than one of law. Whether a contractual relation existed depends upon whether what was done by the parties raises an implied contract; and even if not, whether the conduct of the parties does, or does not, estop the one or the other from denying the existence of a contractual relation.

Now, what was done was this:

July 3, 1888, plaintiff in error was notified that defend-

ant in error had acquired, by assignment, the contract in question, and would fill all orders according to the terms of said contract.

Subsequently the plaintiff in error ordered from the Siemens-Lungren Gas Illuminating Company, and received from the defendant in error the various articles which form the subject of the account in suit. When the account was sued upon, the plaintiff in error filed a cross-petition against the defendant in error, claiming damages for breach of the covenants in the original contract, and actually recovered against the defendant in error a portion of those damages.

Upon these facts we submit two propositions, too obvious to require the citation of authority.

1st. That the plaintiff in error is liable at least upon the *quantum meruit* for the value of the goods so received, used and apropriated.

2d. That having declared upon the contract by cross-petition against defendant in error, and actually having recovered damages for a breach of the covenants thereof, plaintiff in error is estopped from now asserting their non-assent to the assignment of the contract, or that the defendant in error was not the "real party in interest."

Reliance is placed upon *Arkansas Smelting Company vs. Belden Mining Company*, 127 U. S., 379, in support of proposition I. That case involved an executory contract for the sale of certain ore to a partnership on credit. The partnership assigned the contract to a corporation. The vendor refused to supply the ore to the corporation. Action was by the corporation against the vendor for breach. The court, in affirming a judgment sustaining a demurrer to the petition, used the language quoted by counsel in their brief. Clearly, neither of the propositions we state above can apply to such a case. The contract was executory in all respects. No goods had been furnished for which pay-

ment was refused, nor was there any conduct or facts to raise an estoppel. The case proceeded upon the simple doctrine that where one agrees to give credit to A, he can not, without his own assent, be compelled to give credit to B. But this is very far from saying that if he knowingly receives goods from B, he need not pay for them, because his contract was with A.

of Hamilton, Butler and Montgomery, in the state of Ohio.

2d. The Siemens-Lungren Gas Illuminating Company

The true rule is stated by Pollock: "The benefit of a contract can generally be transferred without the other party's assent, yet not so as to put the assignee in any better position than the assignor. Hence the rule that the assignee is bound by all the equities affecting what is assigned."

Wald's Pollock on Contracts, 425.

And, again, (Ibidem, p. 189), speaking of contracts involving personal confidence between the parties, "if, in any of these cases, the transaction is continued by mutual consent, it is a new contract, *e. g.*, if a servant continues his service with a deceased master's family, or if a painter's executor, being also a painter, were to complete an unfinished portrait on the original terms at the sitter's request."

II.

The second proposition announced by counsel is this:

2. "Even if the action could be maintained by defendant in error, it would be subject to all the terms and conditions of the contract of November 9, 1887, (Ex. A., R., 11); and subject to all the rights and liabilities existing between the original parties to that contract."

This we do not dispute.

III.

The third proposition is this:

3d. "The measure of damages for breach of a contract of

license to vend and use patented articles within specified territory, when such breach consists of sales by the licenser himself of the patented articles within such territory, is not limited to the mere difference between the prices at which the licenser agrees to furnish the articles to the licensee and the prices at which the licenser wrongfully sells them to strangers within such territory.

"Whatever may be the true measure of damages in such cases, the defendant in error was liable to plaintiff in error not only for sales by its assignor within such territory, but also for sales therein by the parent or Philadelphia company."

Whether this proposition be sound law or not, its vice, as applied to this case, is its inapplicability. It is necessary here to briefly state the facts out of which the alleged errors underlying this proposition arise.

It will be remembered that among the covenants of the contract to be performed by the Chicago company was one to the effect that the said Chicago company would not *knowingly* sell, or permit other parties to sell, for use in said territory any of the appliances covered by said contract.

Record, p. 11.

The alleged breach of this covenant forms the subject of the first count in the cross-petition.

Record, p. 7.

It appeared by the evidence of Mr. Clapp, President and Secretary of the Middletown Gas Company, that his company purchased in all nine lamps from the Chicago company, and one hundred and thirteen lamps from the Philadelphia company.

The evidence as to the sale of the nine lamps by the Chicago company is found on page 67 of the record, and is as follows, the witness being L. J. Wolf:

"Q. State what, if any, lamps were sold by either the Siemens-Lungren Gas Illuminating Company, or the Wes-

tern Siemens-Langren Company during your connection with said companies, in any territory belonging to the defendant, and state fully how it came that said lamps were sold in said territory, if they were?

"A. There were no lamps sold by either company, excepting nine lamps that were sent to Middletown, Ohio, to the Middletown Gas Company. We received several orders from them for small quantities of lamps, and took it for granted that the Cincinnati company would have no objections to our sending them, nor any further interest in our sending them than to get their share of the profit.

Upon shipping the lamps to Middletown we notified the Cincinnati company that the goods had been shipped, and the proper difference between the price to the Middletown Gas Company and the price to the Cincinnati company had been credited to the Cincinnati company. The Cincinnati company finally notified us that they would prefer that we did not send any more lamps to Middletown, and we then notified the Middletown Gas Company, upon receipt of subsequent orders, that the Cincinnati company objected to our sending any goods to them from Chicago and that they would have to apply to the Cincinnati company for any lamps they would want. In answer to our letters to the Cincinnati company, in which we stated that we had credited the difference in price to their account, they wrote that they would leave that matter to be adjusted at some future time, and in their settlements for merchandise subsequently with us they took no recognition of the credit we had given them for their share of the profit."

The letters bearing upon this subject are to be found on pages 101, 102 and 103 of the record, and, so far as they are material, are as follows:

CINCINNATI, February 4, 1888.

Siemens-Langren Gas Illuminating Company, Chicago:

GENTLEMEN—I am in receipt of your favor of the state-

ment of your account amounting to $2,069, with a credit of $13.15. We were not aware of any lamps being sold in your territory mentioned and would prefer leaving that for discussion to the future. * * *

Very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.

Per E. O. ESHELBY,
President.

CINCINNATI, March 6, 1888.

Siemens-Lungren Gas Illuminating Company, Chicago:

GENTLEMEN—In answer to your communication of March 3rd, containing enclosures from the Middletown Gas Company, I desire to say that we have had this under consideration for some time, and we must respectfully ask you, if you have not already done so, to notify the Middletown Gas Company or any other person or persons within the territory that we have purchased from you, that we possess the exclusive and sole right to this territory, and that they must transact their business with us.

Yours truly,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.

Per E. O. ESHELBY,
President.

CINCINNATI, March 7, 1888.

Siemens-Lungren Gas Illuminating Company, Chicago:

GENTLEMEN— * * * As to the credit upon the Middletown lamps, as stated before, we wish to leave that for

future consideration. You may send us at once fifty 12-foot lamps.

Very respectfully,

THE CINCINNATI SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.

Per E. O. ESHELBY,
President.

March 3, 1888.

Middletown Gas Company, Middletown, O.:

GENTLEMEN—We are in receipt of your favor of the first inst. and dispatch of last night. In reply, would say that, as explained to you on February 20th, the Siemens-Lungren Gas Illuminating Company, of Cincinnati, who control your district in Ohio, wrote us that they would prefer filling orders for their own district themselves, and we have accordingly transferred the order you sent to them, with a request that they write you at once in reference to it * * * *

THE SIEMENS-LUNGREN GAS ILLUMINATING COMPANY,
Very truly yours,

Per L. J. WOLF,
Secretary.

March 12, 1888.

G. N. Clapp, Esq., Secretary Middletown Gas Company:

DEAR SIR—We are in receipt of your favor of the 10th inst., and in reply would say that we are sorry the Cincinnati company has not given your order the attention which it demanded. When we wrote you some time ago, that we had not sold the territory in which Middletown is situated, we were in error, and did not know the county you were located in, but the Cincinnati people who bought that territory have strictly prohibited us from filling any orders.

We hope you will reconsider your decision about countermanding your order.

Very truly yours,

THE SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.

L. J. WOLF,

Secretary.

March 26, 1888.

Middletown Gas Company, Middletown, O.:

GENTLEMEN—Your postal of the 24th inst. to hand and noted. In reply would say that we had disposed of the territory in which your town is located previous to any transaction or business with your company, and when we shipped your first lot of lamps we were not aware that Middletown was situated in that territory. We were notified by the Cincinnati company not to ship any lamps to your city, as they preferred to fill orders for their territory themselves, and we must therefore decline to interfere.

Very truly yours,

THE SIEMENS-LUNGREN GAS ILLUMINATING COMPANY.

Per JOS. WOLF,

President.

The above is all the material evidence on the subject of the sale of the nine lamps to Middletown, and upon this counsel states, (Brief, p. 16), "Such a breach of contract has in it the very essence of malice or reckless disregard of the rights of others." We concede that in the sale of these nine lamps there was a technical breach of the covenant, but the evidence is undisputed that it was innocently done, and that abundant reparation was repeatedly offered; and how recklessness and malice can be inferred from the above quoted evidence, is entirely beyond our power of discernment. The various cases therefore cited by counsel announcing the rules of law applicable to the willful, deliber-

ate and malicious violation of a contract right can have no application here, and it is unnecessary to review said cases in detail. Upon this point the charge of the court was as follows:

Record, pp. 54 and 55.

"The second defense, (that is the third one as numbered in the answer, but the second that you are to consider), is that whereas the contract provides that the defendant should have the exclusive sale of the lamps specified in the counties of Hamilton, Butler and Montgomery, the plaintiffs sold lamps at Middletown, Butler county, Ohio, thereby violating that condition of the contract.

Now, it appears, and I think the testimony is undisputed on this point, that the Chicago company did sell outright to parties in Middletown nine lamps, and subsequently quite a number were sold and delivered to parties in Middletown by the parent company. Of that I will speak presently, but now I confine myself to the nine lamps sold by the Chicago company to parties in Middletown.

Upon attention being called to the sale, the Chicago company notified the defendant, the Cincinnati company, of its willingness to pay a sum stated in evidence, of which I have not a memoranda, but it was their profit of $4.80 per lamp. That was not accepted by the Cincinnati company, which claimed that it was entitled upon those nine lamps to the amount which it would have made if it had furnished them upon its own terms, which were either a rental at the rate of $12 per annum per lamp, or a price for a sale outright of $35 after the first year's rental.

Now, gentlemen, as the case was in progress, I ruled out that testimony as furnishing a measure of damages for the reason that the law regards damages in matters of this sort as compensatory merely, and therefore awards what will make the party complaining whole, by the rule that the damage shall be that which it incurred as a natural and

proximate result of the wrongful act. The law does not permit the recovery of speculative damages as profits which a party estimates or supposes he might have made if he himself had conducted the transaction. It permits the recovery of profits as such only when they are so certain as to be relieved from the objection that they are speculative and uncertain, and the difficulty of the claim under consideration on the part of the defendant is right here, that it by no means follows that the Middletown parties, who were willing to pay to the Chicago company four dollars for each lamp, would have been willing, had they not obtained the lamps from the Chicago company, to pay the Cincinnati company a rent of $12 for the first year and then $35 for the lamp. Indeed, it appeared by the testimony of Mr. Eshelby, that negotiations were pending with these parties in Middletown and that they were not willing to pay the price asked by the Cincinnati company. Therefore, in consideration of the rule of law which I have stated to you, and which has been confirmed by the Supreme Court of the United States, the defendants' claim in this regard, as to the amount of damages, was ruled out; but the defendant is entitled to recover proper and legitimate damages for the sale of those nine lamps at Middletown; and I have to say to you that the only legitimate damage, and the only damage that you can consider in that regard, is the profit which the Chicago company actually made upon the sale of each one of those lamps, which, I think, according to the testimony, is conceded to be $4.83 per lamp."

This rule of damages, as stated by the court, has been settled by law since the decision of

Seymour vs. McCormick, 16 How., 480.

That was an action for damages for infringement. The court below charged the jury that the plaintiff was entitled to recover damages, to be determined by ascertaining the profits which, in judgment of law, he would have made, pro-

vided the defendants had not interfered with his rights.

"That view, says the court, proceeds upon the principle that if the defendant had not interfered with the patentee, the persons who bought the defendant's machines would necessarily have been obliged to go to the patentee to purchase his machines. This is the principle upon which the profits that the patentee might have made out of the machines thus unlawfuly constructed, present a ground that may aid the jury in arriving at the damages which the patentee sustained."

This court, in reversing the judgment of the court below, said, referring to the above quoted instruction, (page 488) :

"We are of opinion that the plaintiffs have just reason of complaint as regards these instructions and their consequent result."

The court further said that in such cases the "profit *of the infringer* may be the only criterion of the actual damage of the patentee," page 489, and further, on page 490, "Actual damage must be actually proved and can not be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee would have made if the infringer had not interfered with his rights is a question of fact and not a 'judgment of law.' The question is not what speculatively he may have lost, but what actually did he lose." * * * Such a rule of damages would be better entitled to the epithet of 'speculative,' 'imaginary' or 'fanciful' than that of actual."

The rule stated in *Seymour vs. McCormack* above practically overruled several cases decided at the Circuit to the effect that there was a presumption that the plaintiff's profits were diminished in proportion to those made by the infringer. See

Wilbur vs. Beecher, 2d Blatchf., 132.

Hall vs. Wiles, 2d id., 194.

It is now well settled that there is no such legal infer-

ence, but that actual damages are required to be proved. They can not be found unless the plaintiff furnishes the jury some data for the computation.

Mayer vs. Ransom, 23 How., 487.
Blake vs. Robertson, 94 U. S., 728.
Cowing vs. Ramsey, 8 Blatchf., 36.
Phillip vs. Nock, 17 Wall., 460.
Royer vs Schultz, 45th Fed. Rep, 51.

The latter recent case announces the correct rule which goes much further than the rule stated by the court below. It is there held that in an action at law for infringenient, actual damages only are recoverable, and that while it is proper to receive evidence in such an action, of the profits realized by the infringer, yet the amount of such profits can not be taken as a measure of damage unless other evidence is offered from which it may be inferred that but for the infringement the patentee would have realized the profits shown to have been realized by the infringer. It will be remembered that at bar the court below allowed a recovery to the defendant below of the entire amount of profit shown to have been realized by the Chicago company in the sale of the Middletown lamps, and yet there was no evidence tending to show that the defendant below would have sold the nine lamps in question if the Chicago company had not sold them.

The cross-petition at bar was essentially an action at law, and the evidence should accordingly be judged by the rules applicable to such actions. That the measure of damages in such a case is merely the actual damages sustained by the complaining party, is well stated by Mr. Justice Clifford in *Birdsall vs. Coolidge*, 93 U. S., 68.

In equity cases the gains and profits of the infringer have been held to be competent as furnishing a proper measure of damages, but even in equity it has never been ruled, so far as we are advised, that evidence of the pros-

pective profits of the complaining party is competent. See in regard, *Burdell vs. Denig*, 92 U. S., 716, where Mr. Justice Miller, in distinguishing between the rule in equity and at law, says:

"But it can not be admitted that in an action at law the "profits which the other party might have made, is "the primary or controlling measure of damages."

In a word, in order to make the third proposition of counsel applicable at bar, it would have been necessary to show that the Cincinnati company would have sold to the Middletown company the nine lamps in question at their own price.

Suffolk vs. Hayden, 3 Wall, 315.
Phillip vs. Nock, supra.

The case of *Howard vs. Stillwell*, 139 U. S., 199, relied upon by counsel, announces, it seems to us, precisely the opposite rule for which he contends. See syllabus.

The court below, in the charge to the jury, eliminated from their consideration any question as to damages flowing from the sale by the Philadelphia company to the Middletown Gas Company of the 113 lamps. (Record, p. 56). This, as stated by the court, was because the contract provided that the Chicago company would not *knowingly* permit other parties to sell within the prescribed territory, and that there was no evidence to show that the Chicago company did *knowingly* permit the Philadelphia company so to sell. It is sufficient to say, as to this, that the court was correct as to the condition of the evidence, and that both the President and Secretary of the Cnicago company were uncontradicted in their statement that they had no knewledge at any time of any such sales having been made by the Philadelphia compony. It is clear that under the language of the contract, no damages could be recovered in this regard unless scienter was shown, and that the burden to show it was upon the Cincinnati company.

4th. The fourth proposition of counsel is this:

"Where damages are recoverable, as, for instance, upon "the breach of the licenser's obligation under such "contract to keep patented articles in repair for a "specified time, the recovery should be allowed for "the whole time specified and not simply up to the "date of the trial."

It is unnecessary to review authority upon this proposition for the simple reason that no such damages were claimed in the cross-petition. The covenant of the Chicago company, it is true, was to defray the expenses of any incidental repairs for five years, but the third count in the cross-petition, upon which this question arises, makes no claim for damages to be incurred subsequent to the date of the filing of the cross-petition. After reciting the covenant, it says, (Record, page 9):

"The defendant alleges that it *has paid out* for such re- "pairs to lamps so purchased by it, including those "stated in the account attached to the petition to "date, the sum of sixteen hundred dollars, no part of "which has been repaid to it."

If the cross-petition had made any claim for such damages as are covered by the fourth proposition, the soundness of the proposition might be open to question.

5th. The fifth proposition, made in behalf of the plaintiff in error, relates to the fourth count in the cross-petition, which is in substance an averment of a breach of the covenant in the contract, whereby the Chicago company agreed to furnish the Cincinnati company with the patented articles manufactured by the Philadelphia company. Said count alleges that the Chicago company in fact furnished to the Cincinnati company a number of lamps manufactured by the Chicago company, and which were infringements upon the patents in question. The facts were these: It being found inconvenient to ship the completed lamp

from Philadelphia to Chicago, the Philadelphia and Chicago companies agreed that said lamps should be shipped in what was called "knock down form"—that is the parts were manufactured in Philadelphia, packed compactly together, and sent to Chicago, the Chicago company putting them together and then shipping them as a whole to their customers. The evidence was undisputed that as to these ninety-two lamps, twelve were sold by the plaintiff in error for the full price, to-wit, $35 apiece, and as to the rest, that they were never tendered back to the Chicago company. The evidence as to whether these lamps so put together in Chicago were defective is conflicting and so was submitted to the jury by the court below as a question of fact. (Record, page 58). Mr. Wolf testified (Record, page 69) as follows:

"*Q.* State whether the said lamps partially made in Chicago and partially in Philadelphia, as you have stated, were serviceable lamps for mercantile purposes, or otherwise?

"*A.* They were. Of that I am positive, for this reason: No lamp, as described in my answer to the previous question, was ever sent without first being tested by us.

"*Q.* You may state what character of lamps your companies in Chicago delivered to the Cincinnati company with reference to their being, or not being, of the most improved pattern at the date of shipment.

"*A.* We always shipped the most improved patterns, necessarily so, because we carried no large stock in Chicago, simply keeping supplies for a few days in advance, as our stock became exhausted ordering anew from Philadelphia."

Moreover, there was evidence showing that long after the receipt of these alleged worthless lamps, the plaintiff made no complaint, never wrote to Chicago regarding them, but, on the contrary, ordered more lamps for use as a display at

the Cincinnati Exposition. The evidence to show that the lamps were worthless is simply that a representative of the Philadelphia company advised the Cincinnati company to discard them from use. The question, therefore, whether there was any failure of warranty or defect was properly submitted to the jury, and this, of course, involved the value of the lamps; if the jury found that there was no defect, the value of the lamps would necessarily be fixed by the contract price. If the jury found there was a defect, they had no evidence whatever before them to determine what the value of the lamps was, including the defect, except that it was undisputed, as above stated, that twelve of the lamps were sold by the Cincinnati company for the full trade price.

It follows that the fifth proposition of counsel, which is grounded entirely upon the theory that the said lamps were entirely worthless, can not be maintained. No one will dispute the general rule announced by the court, (Record, p 59), that the vendee of an article which, for any reason, turns out to be defective, has his election of two remedies: If there is a warranty, he may keep the goods and sue for breach; or he may, subject to certain exceptions, return, or offer to return, the goods and recover back the consideration. But he can not both keep the goods and recover back the entire consideration, which was what was attempted by the fourth count of the cross-petition at bar. It is true that in the cases cited by counsel the doctrine is announced that where the goods were entirely worthless, the necessity of a return is dispensed with, but as we have shown above, there was no evidence in this case to that effect, and consequently the doctrine of said cases, whether sound or unsound, has no application here.

The burden of showing that the lamps were "entirely worthless" is upon the party alleging it. "In such case the burden of proof is upon the defendants to show not only

that the goods purchased were not as represented or warranted, but also to show, in case they are not returned or tendered, *that they are absolutely worthless for any purpose.*"

Manufacturing Co. vs. Wood, 84 Mich., at 458.

The cases in question are all based upon the assumption that there was a technical warranty. If so, the measure of damages for a breach would be the difference between the value of the goods as warranted and their value as furnished and kept.

Cothers vs. Keever, 4 Pa. St. 168.
Comstock vs. Hutchinson, 10 Barb., 211.
Tuttle vs. Brown, 4 Gray, 457.
Goodwin vs. Morse, 9 Metc., 278.
Rutan vs. Laidlaw, 29 N. J. L., 398.
Marsh vs. McPherson, 105 U. S., at 717–718.
Dushane vs. Benedict, 120 U. S., at 648.
Hige vs. Newsome, 96 Ind., at 431.

But a reference to the fourth count in the cross-petition will show that no contract of warranty was pleaded. That count declares upon an entirely different state of facts. It seeks to recover back the consideration paid for certain articles because they were not the articles called for by the contract, but articles entirely different.

This is not a warranty but a condition.

Benjamin on Sales, Ed. 1892, page 553.

Now, if a condition, the vendee had a right to refuse to receive, or if he received and discovered the breach subsequently, was bound to affirm or rescind within a reasonable time.

In this case the vendee elected to affirm, and we insist that his conduct in retaining the property, selling a portion thereof, and ordering more lamps without disclosing any alleged breach of the condition, is a clear waiver of the right to rescind subsequently.

Benjamin on Sales, Sec. 566 et seq.

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Supreme Court of the United States.

OCTOBER TERM, 1892. TERM NO. 193..

The Cincinnati Siemens-Lungren Gas Illuminating Company.

Plaintiff in Error,

vs.

The Western Siemens-Lungren Company.

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

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REPLY TO BRIEF FOR DEFENDANT IN ERROR.

I.

If we understand counsel's effort to meet our first proposition, it is that according to their views of the facts we are liable either (1) upon a *quantum meruit*, or (2) by way of estoppel based on the fact that plaintiff in error, in addition to its other defenses, asserted certain claims it held against the old Chicago company. It ought to be a sufficient reply to suggest, *first*, that the defendant in error did not either bring or try its action upon any idea of *quantum meruit*, but on a

contract at alleged agreed prices (see petition and reply, R., pp. 1, 14); and, *second*, that estoppel is never founded upon an involuntary act; and it never can rightfully be said of a defendant that it has voluntarily assented to an assignment of a contract, simply because, after pleading as a defense its dissent to such assignment, it employs as an additional defense a set-off or counterclaim it holds against either the one that has wrongfully assigned the contract or the one that wrongfully claims under it; for that would be inconsistent with the fact that the defendant is an involuntary actor in the suit, and is entitled to protect itself by the use of all the defenses it may have.

In determining whether the delivery of the goods in question by defendant in error and their receipt by plaintiff in error operated to create privity of contract between them, we shall be aided, if, in addition to bearing in mind that plaintiff in error persisted in sending all its orders only to the old Chicago company, we also recall some dates. The goods sued for, all appear to have been sold between June 23 and July 30, 1888, except one item which appears to have been sold on "Aug. —," of that year (R. 2. Ex. A). Yet afterward, as shown in our former brief, to wit, on August 7 and 8, 1888, correspondence took place between the Cincinnati company and the old Chicago company, in which the former notified the latter that it would not "in any manner become a party to any such transfer or assignment" (R. 109). And the Chicago company, in response, said: "There is nothing for us to do but to allow the contracts at present existing between you and ourselves to remain in force" (Id.) Coupling this with the conceded fact that the controlling officials of the old and new Chicago companies were identical, it is difficult to see how acquiescence in a protest against assignment of a contract, or protection against the same, could ever be accomplished, if both did not occur here. Acquiescence in the Cincinnati company's protest, and not acquiescence in the

Chicago company's assignment, is the true analysis of the facts. The result is, as we contend, that the facts of this case clearly show that defendant in error was the mere instrument or agent acting for and on behalf of the old Chicago company in furnishing the goods in question. It was a case, too, where the principal was directly communicated with and expressly held, while the agent was expressly repudiated, in ordering and receiving the goods.

Arkansas Valley Smelting Co. v. *Belden Mining Co.*, 127 U. S. 379, is not distinguished by the suggestion that there "the contract was executory in all respects." (B. 6.) The principle of that case is, that where there are covenants which, after the delivery of the goods, call for the performance by one of the contracting parties of continuing duties or obligations of a personal character, an assignment of the contract can not be made by that party without the consent of the other. It holds, also, that the application of this principle is not altered by the fact that there may have been one or more previous assignments to which assent was given. Counsel ignore these features of the decision, and also the peculiar character of the covenants of the contract here in dispute. They make no response whatever to the obligations of the seller of the articles under the contract, in regard to the guaranteed life service of the lamps, their repairs, the guaranteed protection of the purchaser in the use and sale thereof, not to speak of other continuing duties. Their citations from Wald's Pollock on Contracts are irrelevant. The quotation made from Mr. Pollock in the decision of this court just alluded to, is pertinent to the facts of the present case, and ought to be conclusive.

II.

Counsel assent to our second proposition. (B. 7.)

III.

We do not see that counsel have benefited their case by their extended quotations from the testimony of L. J. Wolf (B. 9), or the portions of correspondence set out in their brief. (B. 10, 12.) In view of the peculiar nature and objects of the contract dated November 9, 1887 (R. 11), it is surprising that any one would either state or quote, as a defense against a breach consisting of the licenser's own sales of lamps within the territory it had previously sold, such language as this: "We received several orders from them for small quantities of lamps, *and took it for granted that the Cincinnati company would have no objections to our sending them, nor any further interest in our sending them, than to get their share of the profit.*" (Ev. of L. J. Wolf, R. 67, quoted by counsel, B. 9.) We need not repeat what we said in our former brief respecting correspondence, in which the licenser affected ignorance of the fact that such a place as Middletown was within the territory previously sold to the Cincinnati company. There is no pretense that they had any unsold territory in Ohio. It was impossible, therefore, that they should have been ignorant of the fact that they were violating some contract of sale, if not this particular contract. That was sufficient to put them on inquiry and charge them with notice of all that inquiry would have disclosed. But, as suggested in our former brief and not responded to by opposing counsel, even this poor excuse is destroyed by the above quoted language of Wolf, that they "took it for granted that the Cincinnati company would have no objections." This is an answer also to the statement of counsel that there was only "a technical breach of the covenant, but the evidence is undisputed that it was innocently done." (B. 12.) The alleged repeated offers of reparation (id.) were merely the Cincinnati company's "share of the profit" (Ev. of Wolf quoted in brief,

near bot. page 9); that is, the difference between the price at which the Chicago company sold the lamps to the Middletown company and the price at which the Chicago company agreed to sell lamps to the Cincinnati company, viz, about four dollars per lamp. Of course, the Cincinnati company rejected such proffered reparation. It was entitled to the profits which it was making by its own sales.

Whether we are right or not in our contention here, as well as in our former brief, that the evidence in regard to this breach shows malice or a reckless disregard of the rights of others, it will not do for counsel to endeavor to escape the authorities we cite in support of our third proposition, by a mere assertion that they have no application. (See former brief, pp. 21 to 25.) We did not say that those authorities were applicable or not according as this court would or would not find that the evidence showed malice or a reckless disregard of the rights of others on the part of those committing the breach in question. We claimed that the rule of damages for an infringement of a patent by one who may honestly believe that he is not an infringer, is not and ought not to be the criterion for the damages which should be allowed as against the licenser who willfully violates his contract by making sales within the licensed territory. The occasion for this suggestion was the distinction which we insist exists between a case like *Seymour* v. *McCormick*, 16 How. 480, and a case like this one. The evidence shows clearly that the lamps were sold within territory previously disposed of. Hence, the sales were knowingly made in violation of the contract. If that is not a willful breach, what is?

In further support of the distinction between our case and the class of decisions to which the one rendered in *Seymour* v. *McCormick* belongs, we call attention to the statutory object which has ever been sought to be accomplished by the rules laid down in this court for estimating damages caused by infringements of patents. This object was in substance to

take away the motive of the infringer of patented rights by requiring him to pay his profits in the form of damages or otherwise to the owner of the patent. The purpose of this was protection to the holder of the patent, and the consequent encouragement of inventive genius. Ordinarily, the taking away of the infringer's profits may effectuate the end in view; but, as we understand, this court has not hesitated to vary the rule within the limits of the statute wherever the conduct of the offender required it. A review of the decisions rendered in cases both at law and equity prior to 1881 was made in *Root* v. *Ry. Co.*, 105 U. S. 189. True, that case did not involve the question we are now considering, but we refer to it as a convenient analysis of the several acts of congress on the subject of damages for infringement, and of the class of decisions to which *Seymour* v. *McCormick* belongs.

Cornely v. *Marckwald*, 131 U. S. 159.

It is a noticeable fact that this court never alludes to the decision in *Seymour* v. *McCormick*, or any other decision like it, when it is determining rights and liabilities in cases involving breach of contract. As shown in our former brief from *Howard* v. *Stillwell & Bierce M'f'g Co.*, 139 U. S. 199, anticipated profits upon a contract may be recovered under circumstances showing that "it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it is entered into."

Dushane v. *Benedict*, 120 U. S. 630, states, in substance, that damages recoverable for breach of a contract of warranty "include all damages which, in the contemplation of the parties, or according to the natural or usual course of things, may result from the wrongful act." (Id. bot. p. 636.)

See also *Parish* v. *U. S.*, 100 U. S. 500.

Mueller v. *United States*, 113 U. S. 153.

United States v. *Behan*, 110 U. S. 338.

We refer to these several cases of damage suits for the purpose of showing (1) that the rule laid down in *Seymour* v. *McCormick* was not adopted for cases relating to breach of contract, and (2) that the rule adopted for measuring damages for breach of contract is varied so as to include in each instance all damages which may reasonably be presumed to have been within the contemplation of the parties. Hence, we still insist that the peculiar nature and objects of our contract, coupled with the circumstances under which the breach in question was committed, entitle us to claim that the profits which the Cincinnati company might fairly make under its license contract, not the profits which the licenser would make by its own wrongful sales within the territory sold, were reasonably within the contemplation of each contracting party. Yet opposing counsel offer no citations to meet either our claim or the authorities cited in its support, except cases relating merely to the measure of damages for infringement of patent rights. (B. 15 to 17).

On page 17 counsel say that it was necessary for plaintiff in error to show that it would have sold to the Middletown company the lamps in question at its own price. They again cite only patent cases to support their claim. They state the rule too broadly for those cases. But even if they were right, an inspection of the record at p. 35, will satisfy your Honors that the court below interposed and broke up a line of examination which would reasonably have shown that the Cincinnati company could have sold its lamps at its own fixed prices, had it not been interfered with by the Chicago company.

As to our rights against the parent company we submit that counsel have not fairly met what was shown in that regard in our original brief.

IV.

Counsel can not escape our fourth proposition or the authorities cited to support it, by the mere suggestion that the third count "makes no claim for damages to be incurred subsequent to the date of the filing" of the cross-petition. (B. 18.) The third count states with sufficient detail and certainty the terms of the contract of November 9, 1887, including the obligation of the Chicago company to defray the expense of any incidental repairs which might be necessary to keep the lamps in good condition for five years, and its failure to keep such obligation. The statement quoted in counsel's brief to the effect that a specified sum of money had been paid out for repairs, was simply descriptive of a past fact, and not intended as a limitation upon the amount which the evidence might disclose as fairly recoverable both as respects the past and the future. It was wholly unnecessary to state an amount or a prayer as regards future damages. It was sufficient to state the facts from which a conclusion could fairly be drawn by the court upon the evidence both as to the nature of relief and amount of recovery to which the cross-petitioner was entitled. But it is to be observed that the cross-petition does contain a general prayer at its end for $23,850. Why might not damages for future repairs have been fairly included within that prayer? The Ohio code requires all its provisions and all proceedings thereunder to be "liberally construed, in order to promote its object, and assist the parties in obtaining justice." (R. S. § 4948.) Moreover, the case was not tried upon the theory now put forth by counsel. The court below did not make that the ground for sustaining its objection to the proof offered to show an increase of cost in the future as compared with the proved cost of the past (R. 37); or for delivering its charge to the jury in the form it was given.

As shown in our former brief, both the Chicago companies had lost their contracts with the parent company, and were practically out of business. For reasons there shown, we were entitled to have our damages estimated once for all.

V.

Opposing counsel try here, as they seem to have done at the trial below, to show that lamps which were manufactured by the parent company at Philadelphia and sent to the Chicago company in so-called "knock down form," embraced the 92 lamps entire which are covered by our fifth proposition. (B. 19.) There was no evidence to justify any such claim. The evidence is as clear as sunshine that the 92 lamps were part of a lot of 100 which the old Chicago company partially manufactured, and did so in such a way as to render the lamps worthless. Counsel can not evade this. (See former brief pp. 30, 34.)

"Knock down form" is explained by Wolf, former president of the Chicago company, at page 66 of the Record. His evidence plainly shows that every part of each lamp composing what was called the "knock down form" was manufactured in Philadelphia; and that for purposes of economy the parts were shipped in compact form instead of being formulated into lamps and sent in the shape of lamps. In answer to a question touching reductions in price, he stated:

"A. There was a reduction made that would appear on the surface to cheapen the lamp, but in reality it did not cheapen it any or but a little. When the goods were shipped us under the first price, the lamps were sent put together, the different parts adjusted, and the lamp was nickled. In sending them put together, it made a bulky package and, in consequence, increased the freight rate and the liability to breakage, so that, in consultation between

the Eastern and Western people interested, it was concluded that the lamps should be shipped from the East in what was called knock down form, thereby enabling them to pack one hundred of each article compactly in a box, and the Western company thereupon fitted up a shop to put the lamps together and to do the little filing and adjusting necessary to ship the lamps as plain iron instead of nickeling them East, the Western people believing that they could be better nickeled in Chicago."

In order to understand the testimony of Wolf as quoted at page 19 of counsel's brief, it is necessary for us to quote a portion of Wolf's evidence which the court below excluded. (R., bot. 68, top 69.)

"Q. You may state whether either of the Chicago companies at any time shipped to the Cincinnati company lamps which were an infringement upon the Philadelphia patents or lamps manufactured in whole or in part in Chicago; and, if so, state fully the circumstances.

"A. Neither did. The Siemens-Lungren Gas Illuminating Co. *manufactured some lamps in Chicago*, which under its contract it had a right to do under certain conditions which existed. *Upon attempting to put the Chicago manufactured lamps into use in Chicago*, it was discovered that those portions of the lamps which had been patented were not properly constructed or possibly were made of the wrong material. These parts consisted of the burners, the flame plate, and the governor, the three essential parts of the lamp. *This left only the mere shell of the lamp as being made in Chicago*, consisting of the gas-pipe, *a piece of iron casting, the regenerative chamber*, and the tin chimney stack. In consequence all *governors, burners*, and *flame plates manufactured in Chicago* were discarded and destroyed, and these parts necessary to make a perfect lamp were supplied to us by the Philadelphia company and made a part of the *Chicago-made lamps. When the merchandise and contracts were sold to the Western Siemens-Lungren Co. by the Siemens-Lungren Gas Illuminating Co., a portion of the stock on hand, consisting of these lamps and some of them to the number of* 92, *were sent to Cincinnati.*"

Could any thing more clearly than this show that the Chicago company itself manufactured the defective part of the lamps described in our former brief? Could any thing more clearly than this show that the 92 lamps in question were not in truth wholly manufactured by the parent company at Philadelphia? How vain it is then for counsel to intimate, as they do at page 19 of their brief, that these 92 lamps were manufactured entirely by the parent company in Philadelphia and were a part of the "knock-down form" in the sense in which the parent company had agreed to ship lamps at a smaller price in that form!

It is urged by counsel that because 12 of these lamps were sold for $35 a piece, and because Wolf testified at page 69 of the record that all these lamps had been tested and were serviceable, they were entitled to the charge made by the court below that we were entitled only to nominal damages because we had not tendered the lamps back to the Chicago company. They even assume that this overthrows our evidence that the lamps were and are useless and worthless. (B. 19, 20). This will not do. Mr. Eshelby, president of plaintiff in error, explained that the 12 lamps which had been sold without knowing their defects for $35 apiece were retained by the purchasers only temporarily until plaintiff in error could replace them with serviceable lamps (R. 47). The most that can be said of Wolf's statement as quoted at page 19 of the brief for defendant in error, is that in his *opinion* the lamps were serviceable. This is overthrown completely by the undisputed testimony of both Mr. Eshelby and Mr. Smith that the lamps in fact did not burn and had to be and were removed for that reason. (See former brief, page 30 *et seq.*, together with statement of Mr. Stein, president of parent company at top of page 32). Mr. Eshelby stated at page 32 of the record, that plaintiff in error had been in possession of the lamps for a year and a half, since they were retired from use. At page 44 of

the record he shows that the lamps so retired were kept in the company's cellar:

"Q. Is it not a fact that these 92 or 100 lamps were kept in that cellar?

A. Yes, sir; but this dampness was remedied. We discovered it and had it remedied, had it fixed."

Now, how can it be rationally urged that we were not entitled at least to a submission of this branch of our case to the jury with the instruction that if they found that the lamps were in truth worthless, the defendant below was entitled to recover the price paid for the lamps, or some instruction to that effect? It will not do to say that when our evidence all tended to show that the lamps were worth nothing, it was incumbent upon us to show that they were worth something. It will not do to say that we were bound to show a precise value to lamps, which the observation and experience of all of our witnesses demonstrated had no value.

It is in vain that counsel say that the burden of proof was on the defendant below to show that the lamps were worthless; because they do not and can not go further and show that our evidence in this regard was allowed to go to the jury with even their own injunction touching the burden of proof. Counsel therefore do not and can not meet our complaint that we were deprived of a substantial right, when the court declined to allow the jury even to consider our evidence as to the worthless character of these lamps. Its peremptory instruction was no doubt based upon a misconception of our evidence as to the worthlessness of the lamps. By overlooking the tendency and effect of this evidence, the court below supposed that we were bound to tender back the lamps before we were entitled to any recovery at all. This was substantial error.

Counsel's citations, to show the measure of damages for a breach of warranty, have no application (B. 21); because they apply only to articles having an admitted value, though not the value they would have possessed had they conformed to the warranty. Such cases can not aid in the solution of a question whether the purchaser is entitled to have the jury consider his evidence tending to show that the articles were worthless.

Counsel try in the next place to show, by the fourth count in the cross-petition, that "no contract of warranty was pleaded." They claim that we seek to recover back the consideration paid for articles which were entirely different from those called for by the contract; and that "this is not a warranty, but a condition." (B. 21.) This in effect concedes that the lamps were not what they should have been, but it is a misapprehension of our claim. We do not say that the lamps were not in form and shape lamps. We contend, as the evidence shows, that they had latent defects which were discoverable and discovered only upon trial when put in use. (Former brief, pp. 30, 31.) Our case, therefore, differs radically from the illustration given in Benjamin on Sales (ed. 1892), p. 553, cited by opposing counsel in regard to their alleged distinction between a warranty and a condition. The author illustrates the meaning of the distinction he wishes to draw in this respect by a quotation from Lord Abinger, which is in part this: "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell peas, and if he sell him any thing else in their stead, it is a non-performance of it." The reference to p. 566 of the same text-book, in connection with the statement that "ordering more lamps without disclosing their alleged breach of a condition, is a clear waiver of a right to rescind subsequently" (B. 21), not only ignores again our evidence tend-

ing to show the worthless character of this particular lot of lamps, but confuses that lot with other lamps not containing the latent and fatal defects which were discovered as aforesaid in the ninety-two lamps.

But the endeavor to distinguish between a warranty and condition in this instance is wholly fruitless.

In *Pope* v. *Allis*, 115 U. S., at bot. p. 371, it is said in substance that a condition may include a warranty.

In *Wolcott, Johnston & Co.* v. *Mount*, 36 N. J. L. 262, the plaintiff applied to defendants for a certain kind of turnip seeds which the defendant showed him, and said they were that kind, and sold them as such. They turned out to be a different kind, and in an action for breach of warranty, in the course of the opinion, it was said at p. 267:

"It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason supported by principle can be advanced why he should not have upon his contract such redress as is practicable. *Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.*" (Italics ours.)

Recurring now to counsel's assertion that the fourth paragraph of the cross-petition will show that no contract of warranty was pleaded, it will be seen by reference to that count that the contract of November 9, 1887, is in substance pleaded, showing that the Chicago company had obligated itself "to furnish this defendant with the said patented lamps to be furnished to it by said Philadelphia company, and to defend said defendant from any infringement of said patented lamps," and further, that the company "did furnish to this defendant a large number of lamps purporting to be said patented lamps furnished by said Philadelphia company,

but which were in fact an infringement thereof, and of such poor quality as to be unfit for use. Upon trial of the lamps and the subsequent discovery of the infringements thereof, the defendant was compelled to retire from use ninety-two lamps thereof, which were in use, and they and those having remained unused became useless and worthless property." (R. 9.) The argument of counsel practically concedes that *the contract* of November 9, 1887 (R. 11), contains, either expressly or impliedly, a warranty that the lamps shall be of the manufacture of the parent company at Philadelphia, and seeks avoidance of the contractual obligation and breach upon the theory that it is not properly pleaded. We need not repeat the references already made to the evidence, which show that these lamps were in part constructed by the parent company and in part—the portion containing the latent defect—by the Chicago company. Is not a warranty fairly and substantially pleaded, and its breach fully shown and pleaded?

In *Jones* v. *Just*, L. R. 3 Q. B., at p. 202, Mellor, J., said:

"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied."

Brown v. *Edgington*, 2 Man. & Gr. 279.
Kellogg Bridge Co. v. *Hamilton*, 110 U. S. 108.
Dushane v. *Benedict*, 120 U. S. 630, 636.

In *Seits* v. *Brewers' Ref. Mach. Co.*, 141 U. S. 510, Mr. Chief-Justice Fuller makes a distinction at p. 519, which would fairly establish the warranty we are contending for:

"This is not the case of an alleged defect in the process of manufacture *known to the vendor but not to the purchaser*, nor of presumptive and justifiable reliance by the buyer on

the judgment of the vendor rather than his own. . . ." (Italics ours.)

Bigelow v. *Boxall*, 38 U. C. Q. B. 452.
Rogers & Co. v. *Niles & Co.*, 11 Ohio St. 48.
Byers v. *Chapin*, 28 Ohio St. 300.

In view of the proved facts in this case respecting the latent character of the defect in these lamps in the portion thereof which was manufactured by the Chicago company, without the knowledge either of the parent company or the Cincinnati company, it is difficult to see how learned counsel would attempt to rely on *Morse* v. *Moore*, 83 Me. 481. A vendor there delivered under a contract to sell clear, merchantable ice, two cargoes of ice, to be shipped to Richmond, Va., which were taken at the place of delivery by vessels procured by the vendee, who did not inspect the ice at the place of shipment, although there was sufficient opportunity to do so. And it was held, as quoted in the last portion of the syllabus, "That in an action for the contract price the vendee can set up the vendor's failure to deliver as good ice as the contract called for, in reduction of the damages recoverable." At p. 481, Peters, C. J., said:

"That there is a warranty or a condition precedent amounting to warranty in the contract, there can be no doubt. Such a warranty will be found to be variously characterized in the books as executory warranty—a condition precedent amounting to warranty, in the nature of warranty, with the effect of warranty, equal to warranty, and the like. It is immaterial, for present purpose, whether it be regarded as an express warranty or an express condition implying warranty, as the effect must be the same. One kind within its limit is not a more potential ingredient in a contract than the other, the difference between them being only in the style of agreement to which they may be annexed. An express warranty may be also special, however. It is now well settled by the authorities generally, our own cases included, that a sale of goods by a particular description of quality, imports a war-

ranty that the goods are or shall be of that description—a warranty which becomes a part of the contract if relied upon at the time by the purchaser."

VI.

The response of counsel to our sixth proposition in effect concedes that the 250 lamps having the solid metal burner were not "of the most approved form of regenerative lamps now or which may hereafter be made by the Siemens-Lungren Company," within the meaning of the contract (B. 22; R. 11). Such a concession is not avoided by the suggestion that the solid metal burners were furnished "in good faith" (B. 22). It is immaterial whether they were furnished in good or bad faith, so long as it appears that they were not according to the contract. Counsel are in error when they say that "the Philadelphia company had offered to make the change free of charge" (B., bot. p. 22; see former brief, mid. p. 37).

Respectfully sumbitted.

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